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No. 08-1383

IN THE

Supreme Court of the United States

BLITZ HOLDINGS CORP., AND
GCM CORPORATION, LTD.,
Petitioners,

v.

GRANT THORNTON, LLP, AND
DELOITTE & TOUCHE, LLP,
Respondents.

On Petition For Writ of Certiorari
To The First Court of Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an appellate panel violated the Due Process Clause of the Fourteenth Amendment when it reissued the same opinion originally authored by a justice who heard oral argument, participated in the deliberations and authored the original opinion then, on motion of the appellants, recused herself on the basis of the appearance of impropriety.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Deloitte & Touche, LLP and Grant Thornton, LLP were defendants-appellees below and are respondents to this Court.

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, undersigned counsel states that neither Blitz Holdings Corp. nor GCM Corporation, Ltd. have a parent corporation and no publicly held company owns 10% or more of either stock.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

I. REISSUANCE OF THE OPINION AUTHORED BY A JUSTICE ALCALA DENIES PETITIONERS THEIR RIGHT TO DUE PROCESS 7

II. PARALLEL ISSUE IS CURRENTLY BEING CONSIDERED BY THE SUPREME COURT 14

III. HISTORY OF APPEARANCE OF IMPROPRIETY IN FIRST COURT OF APPEALS OF TEXAS AND CONFLICTING LOWER COURT AUTHORITIES 15

CONCLUSION 19

APPENDIX 20

A. Memorandum Opinion of the First Court of Appeals of Texas (May 24, 2007)

B. Memorandum Opinion on Rehearing by the First Court of Appeals of Texas (Oct. 25, 2007)

C. Memorandum Opinion on Rehearing by the First Court of Appeals of Texas (May 8, 2008)

D. Order on Motion to Recuse by Justice Alcala (Dec. 20, 2007)

E. Memorandum Order Denying Motion for Rehearing by the First Court of Appeals of Texas (Jul. 28, 2008)

F. Memorandum Order Denying Motion for Reconsideration En Banc by the First Court of Appeals of Texas (Jul. 28, 2008)

G. Order from the Texas Supreme Court Denying Petition for Review (Nov. 14, 2008)

H. Order from the Texas Supreme Court Denying Motion for Rehearing of Petition for Review (Jan. 9, 2009)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Aetna Insurance Co. v. Lavoie,
475 U.S. 813 (1986) 8, 11, 12, 15

Antoniu v. Sec. Exch. Comm'n,
877 F.2d 721, 726 (8th Cir. 1989) 17

Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.,
121 F.2d 235, 239 (3rd Cir. 1941) 17

Blitz Holdings Corp. v. Grant Thornton, LLP,
Tex. App. LEXIS 4105 (May 24, 2007) 4

Blitz Holdings Corp. v. Grant Thornton, LLP,
Tex. App. LEXIS 8546 (Oct. 25, 2007) 4, 6

Blitz Holdings Corp. v. Grant Thornton, LLP,
Tex. App. LEXIS 3315 (May 8, 2008) 3, 5, 6, 12

Bradshaw v. McCotter,
796 F.2d 100, 101 (5th Cir. 1986) 17

Caperton v. A.T. Massey Coal Company, Inc.,
No. 08-22 (U.S. Jul. 2, 2008) 14, 15

Cinderella Career and Finishing Schools v. Federal Trade Comm'n,
138 U.S. App. D.C. 152, 425 F.2d 583, 592

(D.C. Cir. 1970) 17

Goodheart v. Cassey,
523 Pa. 188, 565 A.2d 757, 761-62 (1989) 18

Hicks v. City of Watonga,
942 F.2d 737, 748 (10th Cir. 1991) 17

In re Murchison,
349 U.S. 133, 136 (1955) 7, 8

Johnson v. Sturdivant,
295 Ark. 663B, 758 S.W.2d 415, 415-16 (1988)..... 18

Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities,
825 F.2d 946, 949 (6th Cir. 1987) 18

Marshall v. Jerico, Inc.,
446 U.S. 238, 242 (1980) 7

Powell v. Anderson,
660 N.W.2d 107, 122-23 (Minn. 2003) 18

Stivers v. Pierce,
71 F.3d 732, 748 (9th Cir. 1995) 17

Tesco American, Inc. v. Strong Industries, Inc.,
221 S.W.3d 550, 552 (Tex. 2006) 15, 16

Wilkerson v. Johnson,
699 F.2d 325, 328-29 (6th Cir. 1983) 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 2

STATUTES

28 U.S.C. §1257(a)..... 2

RULES

Tex. R. App. P. 41.1(b) 6

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Blitz Holdings Corp. and GCM Corporation, Ltd., respectfully submit this petition for a writ of certiorari for review of the judgment of the First Court of Appeals of Texas.

OPINIONS BELOW

The initial opinion of the First Court of Appeals of Texas was authored by Justice Elsa Alcala, joined by Chief Justice Sherry Radack and Justice Terry Jennings. That opinion was not published but was electronically reported at 2007 Tex. App. LEXIS 4105. Pet. App. A. After granting Petitioners' request for rehearing, the Court issued a second opinion, also authored by Justice Alcala and joined by Chief Justice Radack and Justice Jennings. The second opinion was not published, but was electronically reported at 2007 Tex. App. LEXIS 8546. Pet. App. B. After granting Petitioners' motion for recusal, Justice Alcala recused herself from the case. Following Justice Alcala's recusal, Justice Radack and Justice Jennings issued the current opinion. The opinion is not published but is electronically reported at 2008 Tex. App. LEXIS 3315. Pet. App. C. Justice Alcala's order on motion to recuse was not reported. Pet. App. D. Petitioners filed a Petition for Review with the Texas Supreme Court which was denied on November 14, 2008. Pet. App. G. Petitioners' motion for rehearing was also denied on January 9, 2009. Pet. App. H.

JURISDICTION

The Texas Supreme Court denied a discretionary petition for review on November 14, 2008. Petitioner timely filed a motion for rehearing on petition for review which was denied by the Texas Supreme Court on January 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution which provides, in relevant part:

No State shall ... deprive any person of life, liberty, or property, without due process of law ....

U.S. Const. amend. XIV, § 1.

STATEMENT

This case arises from a transaction in which Petitioner, GCM Corporation, Ltd. ("GCM"), loaned approximately $76 million to IFS Financial Corporation ("IFS"), and secured the loan with corporate stock of IFS Financial Holdings Corporation and Interamericas Financial Holding Corporation. The Interamericas Group of companies was a massive Texas-based international Ponzi scheme operation that attracted millions of dollars from investors which were subsequently used by the Group's principals for their personal use. GCM hired Respondents, Grant Thornton, LLP ("Grant Thornton") and Deloitte & Touche, LLP ("Deloitte & Touche"), to monitor the financial condition of IFS as provided for in the complex loan documents. In

particular, Grant Thornton was hired to audit IFS and inform GCM of the net worth of IFS, and Deloitte & Touche was hired to appraise the corporate stock of IFS to determine its fair market value. The purpose of both endeavors was to keep GCM informed of the financial condition of IFS so it could make reasoned decisions in the event of problems with the loan, such as whether to renew and extend the loan, or foreclose on its collateral. As it turned out, there were problems with repayment on the loan and, based on the inflated values of the collateral determined by Grant Thornton and Deloitte & Touche, GCM elected to renew and extend the loan rather than foreclose. In the end, the unscrupulous principals of IFS absconded with its assets and totally defaulted on the loan to GCM. Petitioner, Blitz Holdings Corp. ("Blitz"), succeeded to the rights of GCM as the holder of the loan as a part of a loan restructure. Blitz and GCM brought suit against Grant Thornton and Deloitte & Touche alleging that had they not been misled as to the value of the collateral, they would have foreclosed and recovered some part of the collateral. Despite the substantial evidence presented by Blitz and GCM at trial, the trial court granted Deloitte & Touche's oral motion for directed verdict and Grant Thornton's written motion for directed verdict. *Blitz Holdings Corp. v. Grant Thornton, LLP*, 2008 Tex. App. LEXIS 3315, at *2 (May 8, 2008); Pet. App. C.

Petitioners appealed the trial court's judgment to the First Court of Appeals of Texas. The original panel of justices reviewing the appeal consisted of Chief Justice Sherry Radack, Justice Terry Jennings, and Justice Elsa Alcala as the authoring justice ("Original Panel"). After hearing oral arguments on April 5, 2006, the Original Panel issued an opinion

delivered by Justice Alcala on May 24, 2007 ("the First Opinion") which affirmed the trial court's directed verdict against Petitioners. *Blitz Holdings Corp. v. Grant Thornton, LLP*, 2007 Tex. App. LEXIS 4105, at *1-2 (May 24, 2007); Pet. App. A. Petitioners moved for rehearing based on the Court's failure to apply the correct standard of review and the factual errors contained in the First Opinion. Recognizing that Petitioners' motion had merit, in an opinion dated October 25, 2007 ("the Second Opinion"), the Original Panel granted Petitioners' motion for rehearing, withdrew the First Opinion, and vacated its previous judgment. *Blitz Holdings Corp. v. Grant Thornton, LLP*, 2007 Tex. App. LEXIS 8546, at *1-2 (Oct. 25, 2007); Pet. App. B. In the Second Opinion, the Panel *purportedly* revisited its legal conclusions, but the opinion contained many of the same factual and legal inaccuracies that existed in the First Opinion, and new inaccuracies as well. The Court's Second Opinion was also authored by Justice Alcala. In addition to the numerous inaccuracies, the Second Opinion also applied an incorrect standard of review for a directed verdict. Accordingly, Petitioners filed a second motion for rehearing on November 19, 2007 based on the substantial errors contained in the Second Opinion.

At or about that time, Petitioners' counsel investigated and discovered ties between Deloitte & Touche's attorneys, Baker Botts, L.L.P. ("Baker Botts"), and Justice Alcala. Based on her legal and financial relationships with Baker Botts and its lead attorney, Stephen Tipps, Petitioners filed a motion to recuse asking that Justice Alcala remove herself from this case. Petitioners' motion to recuse was based on documents received from the Texas Ethics

Commission which showed that Justice Alcala had paid Baker Botts for legal services rendered during the pendency of the appeal and that Justice Alcala had received political contributions from Baker Botts and Stephen Tipps during that time. It was further discovered that a former law clerk of Justice Alcala was hired by Baker Botts in the fall of 2006 while this appeal was being considered by the Original Panel. Respondents filed responses claiming that Petitioners' motion was untimely and without merit. However, on December 20, 2007, soon after the motion had been filed, Justice Alcala recused herself and withdrew from further participation in the appeal. Pet. App. D. In addition to the motions for recusal and rehearing, Petitioners also filed a motion to withdraw opinion asking that the remaining panel members vacate the opinion delivered by Justice Alcala on the grounds that the First Court's reliance on the Second Opinion would further the appearance of impropriety which Justice Alcala's recusal was meant to avoid. Deloitte and Grant Thornton filed responses to Petitioners' motions.

On May 8, 2008, the remaining panel, consisting of Chief Justice Radack and Justice Jennings[1], granted Petitioners' second motion for rehearing, "withdrew" the Second Opinion and issued a third opinion ("Third Opinion"). *Blitz*, 2008 Tex. App.

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[1] During the pendency of this appeal, Justice Jennings also received a campaign contribution from the Baker Botts law firm. This $2,500 contribution was received more than a year prior to the election and before any opponent had filed for the position.

3315, at *1 (May 8, 2008).[2] Despite the panel's ostensible withdrawal of the Second Opinion, the Third Opinion tracked the Second Opinion almost verbatim. With the exception of a few minor revisions, the content of the Second Opinion and Third Opinion is identical. *Cf. Blitz*, 2008 Tex. App. 3315 (May 8, 2008) *with Blitz*, 2007 Tex. App. LEXIS 8546 (Oct. 25, 2007); *see also* Pet. App. B and Pet. App. C. Given that the opinions are virtually identical, Petitioners do not believe that they received an impartial review of the merits by the new panel. Accordingly, Petitioners filed a third motion for rehearing and a motion for reconsideration *en banc*, both of which were denied on July 28, 2008. Pet. App. E; Pet. App. F. Petitioners filed a petition for review with the Texas Supreme Court on September 15, 2008 which was ultimately denied. Pet. App. G. Petitioners subsequently filed a motion for rehearing of petition of review which was also denied. Pet. App. H.

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[2] In reissuing the Second Opinion, the remaining panel members rely upon Rule 41.1(b) of the Texas Rules of Appellate Procedure provides, in pertinent part:

> After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices.

TEX. R. APP. P. 41.1(b). *Blitz*, 2008 Tex. App. 3315, at *1, n.1 (May 8, 2008). Due to the fact that the second opinion and the current opinion are virtually identical, Petitioners do not believe that the case was independently "decided" by the two remaining justices.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case to clarify the circumstances in which the guarantee of judicial neutrality under the Due Process Clause requires that an appellate court consider a case without the participation of a justice who has admitted to the appearance of impropriety based on her substantial ties to a party's counsel. The facts and procedural history of this case, and multiple opinions delivered by the First Court of Appeals, justify the rare granting of certiorari by this Court.

I. REISSUANCE OF THE OPINION AUTHORED BY JUSTICE ALCALA DENIES PETITIONERS THEIR RIGHT TO DUE PROCESS

It is well-established that a fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). Furthermore, the due process clause of the United States Constitution guarantees a party an impartial and disinterested tribunal in civil cases. *See Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980). This requirement of neutrality "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law" and preserves "both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find

against him." *Id.* (internal citations and quotation marks omitted). Due process does not only preclude actual bias, "but also endeavor[s] to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. As this Court has long held, "justice must satisfy the appearance of justice." *Id.* (internal quotations omitted).

Reaffirming the foregoing principles, the Court has clearly established that there is an "appearance of justice" standard that is built in to the Due Process Clause. *See Aetna Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986). In *Aetna*, the Court specifically reestablished its admonition that "[t]he Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.* The Court further articulated that "to perform its high function in the best way, justice must satisfy the appearance of justice." *Id.* at 825 (alterations in original; internal citations and quotation marks omitted). In that case, the Court held that it was a violation of due process for Alabama Supreme Court Justice Embry to participate in an appeal involving an insurance company which would directly impact the outcome of his claims against another insurance company at the lower court level. *Id.* at 824-25. In analyzing the facts of that case, the Court explained that it was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average judge...judge to...lead him not to hold the balance nice, clear, and true." *Id.* at 825 (alterations in original; internal quotations omitted). The Court acknowledged that "it is normally within the power

of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause *unless* it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 821. Based on Justice Embry's "direct, personal, substantial, and pecuniary interest" in the appeal, the Court held that his participation in the case violated the "appearance of justice" standard under the Due Process Clause notwithstanding any existence of *actual* bias. *See id.* at 825.

Although the Court held that Justice Embry was clearly precluded from participating in the appeal, the same could not be said about the other justices of the Alabama Supreme Court. *Id.* at 825-26. Finding that there was no basis for concluding that the remaining justices were disqualified, the Court declined to address the issue of whether the decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case. *Id.* Acknowledging the lack of prior precedent on this issue, the Court nonetheless ordered that the Alabama Supreme Court's decision be vacated and remanded. *Id.* at 827-28. The Court reasoned that the "appearance of justice" would best be served by vacating the decision and remanding for further proceedings because Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion. *Id.* at 282.

In a strong concurring opinion, Justice Brennan elaborated on the reasons why the opinion should be vacated based on Justice Embry's participation in the case:

> ...Justice Embry's participation in this court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed, and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

Id. at 830-31 (Brennan, J., concurring). Echoing Justice Brennan's concerns, Justice Blackmun's concurring opinion went even further stating that

"Justice Embry's mere participation in the shared enterprise of appellate decision-making – whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion – posed an unacceptable danger of subtly distorting the decision-making process." *Id.* at 831 (Blackmun, J., concurring, joined by Marshall, J.). Justice Blackmun further cautioned that because the decision-making process occurs in private, a reviewing court may never discover the actual effect a biased tribunal member had on the outcome of a particular case. *Id.* at 833.

The concerns expressed by Justice Brennan and Justice Blackmun in *Aetna* are not only present in this case, they are exacerbated by Justice Alcala's role. Specifically, in this case, Justice Alcala was not a passive participant in the First Court's decision. To the contrary, Justice Alcala heard oral arguments from counsel, participated in the deliberations and authored two inconsistent opinions holding in favor of Respondents. Although Petitioners agree with Justice Brennan that Justice Alcala's influence in the deliberation process cannot be measured with precision, her significant role in this appeal however "*necessarily* imports bias into the deliberative process." *Id.* at 831. Similar to Justice Blackmun's conclusion with respect to Justice Embry in *Aetna*, "the violation of the Due Process Clause [in this case] occurred when [Justice Alcala] sat on this case, for it was then the danger arose that h[er] vote and h[er] views, potentially tainted by [her ties with Baker Botts and Stephen Tipps], would influence the votes and views of her colleagues." *See id.* at 833 (Blackmun, J., concurring, joined by Marshall, J.).

In this case, Justice Alcala herself acknowledged that the appearance of impropriety existed due to her ties with Deloitte & Touche's counsel, Baker Botts and Stephen Tipps. Pet. App. D. As such, Petitioners were denied their right to due process by the First Court of Appeals's reissuance of Justice Alcala's prior opinion. Such action clearly advances the appearance of bias that Justice Alcala's recusal was meant to circumvent. Certainly a reasonable person on the street would view the circumstances of the previously issued opinions, Justice Alcala's failure to advise counsel of her attorney-client relationship with Baker Botts, the timing of the campaign contributions, the timing of the hiring of the Justice Alcala's law clerk, together with Justice Alcala's recusal, and have a reasonable doubt that Justice Alcala was impartial during this appeal, and therefore question the integrity of the opinions authored by her. If, as in this case, a panel reissues an opinion authored by a justice who has heard oral argument and authored an opinion in favor of a party with whom she has acknowledged the existence of an appearance of bias, that impropriety is advanced by the remaining panel members' reliance on the recused justice's opinion. Such conduct by the remaining justices would undermine the rights protected under the Due Process Clause and violate the "appearance" standard articulated in *Aetna*.

Even a cursory reading of the Third Opinion of the First Court of Appeals would lead the enlightened reader to suspect bias. The primary issue on appeal was whether there was more than a mere scintilla of evidence of the damages that the Petitioners would have recovered had they decided to foreclose. *Blitz*, 2008 Tex. App. 3315, at *13-14 (May

8, 2008). In addition to voluminous expert opinions on the subject, this interesting exchange came into evidence when the Deloitte & Touche appraiser was being cross examined:

> *(BY MR. DROUGHT)*
>
> *Q. Do you know of anything that – material that changed between January 31st and March 31st with regard to IFS?*
>
> *A. No, I don't believe so.*
>
> *Q. Should there have been assets available to collect of $118 million, plus or minus some change, as of March 31st, 2000 had GCM taken over the company?*
>
> *A. Well, there was total value in the corporate entity of 118 million is the number, but that's very different than saying they could write a check for $118 million. They had a lot of assets that were not necessarily cash or ready liquid.*
>
> *Q. I'm not limiting it to something that is readily liquid. If the value was 118 million, would you anticipate that if someone liquidated the assets there would be enough to pay $70 million in debt?*
>
> *A. I believe that the value is 118 million, and that, you know, I don't know how else to answer that question.*
>
> *Q. Yes or no.*
>
> *A. Yeah, I mean if it's 118 million, I think that, you know, in an orderly liquidation –*

MR. WATKINS: We would object to this as being speculative and not within the range of expertise of this witness.

THE COURT: Overruled.

Surely this was more than a mere scintilla of evidence of what could be recovered by Petitioners.

II. PARALLEL ISSUE CURRENTLY BEING CONSIDERED BY THE SUPREME COURT

In a substantially similar matter, this Court has recently undertaken the issue of whether the Due Process Clause requires that a West Virginia Supreme Court of Appeals justice recuse himself from a case after receiving $3 million in campaign contributions from an appellant whose case was being considered by that court. Petition for a Writ of Certiorari, *Caperton v. A. T. Massey Coal Company, Inc.*, No. 08-22 (U.S. Jul. 2, 2008). Specifically, in *Caperton*, the petitioners similarly allege that an unacceptable appearance of bias was generated when respondent Massey Coal Company's chief executive officer spent $3 million supporting Justice Brent Benjamin's candidacy for the West Virginia Supreme Court. *Id.* at 2-3. The issue currently before the Court in *Caperton* is not limited to a determination of whether Justice Benjamin was *actually biased*, which would be difficult to prove with certainty, but whether the circumstances created a perception of *apparent bias* such that the public confidence in the courts is undermined. *Id.* at 16-20 (emphasis

supplied). In support of its appearance of bias argument, the petitioners in *Caperton* allege that Justice Benjamin refused to recuse himself, and then voted with the court's majority to overturn the trial court's verdict against Massey by a 3-2 vote. *Id.* at 2-3. According to the petitioners, after the initial vote by the court, two justices recused themselves and Justice Benjamin, acting as chief justice, appointed two replacement justices. *Id.* In a subsequent vote by the Court, Justice Benjamin once again refused to recuse himself and cast the deciding vote in the court's 3-2 decision in favor of Massey. *Id.*

The facts in *Caperton* are similar to the facts in *Aetna* where this Court was required to analyze the effect of the disqualified justice's participation in the case. *See Aetna, supra.* As such, should this Court decide that Justice Benjamin's significant campaign contributions from Massey, and his subsequent conduct as acting chief justice, warrant mandatory recusal under the Due Process Clause, the Court will be faced with the issue presented in this case which was not expressly reached by the majority in *Aetna*—whether the decision of a multimember tribunal must be vacated because of the recused justice's participation in the case.

III. HISTORY OF APPEARANCE OF IMPROPRIETY IN FIRST COURT OF APPEALS AND CONFLICTING LOWER COURT AUTHORITIES

During this appeal, Petitioner discovered that at least in one other instance, the relationship of Baker Botts and Stephen Tipps with the First Court Justices had been called into question by the Texas

Supreme Court. In *Tesco American, Inc. v. Strong Industries, Inc.* 221 S.W.3d 550 (Tex. 2006), the Texas Supreme Court reviewed a lengthy and unanimous opinion issued by the First Court affirming the trial court's $2 million judgment against Tesco. *Id.* at 552. At the appellate court level, Tesco filed a motion for rehearing together with a motion to disqualify the authoring justice, Justice Laura Higley, on the grounds that Justice Higley had been an attorney at Baker Botts at the same time Stephen Tipps had appeared before the First Court of Appeals as lead counsel for appellees in the matter. *Id.* at 552-53. Although the panel disagreed with Tesco's motion, it submitted the issue to the other justices to be considered *en banc*. Sitting *en banc*, the remaining justices denied Tesco's motion for rehearing and motion to disqualify and reissued substantially the same opinion authored by Justice Higley. *Id.* at 556. The Texas Supreme Court held that although the First Court had jurisdiction over the matter, the judgment had to be reversed because the opinion on which it was based was authored by a justice who was disqualified. *Id.* The Texas Supreme Court, however, did not reach the issue of how the First Court was to proceed procedurally. Notwithstanding the *Tesco American* decision and its possible application to this case, the Texas Supreme Court has refused to review this case and address the issue of whether an appellate court must reconsider a case without the participation of a justice who has admitted to the appearance of impropriety and issue a new opinion

A majority of the federal circuit courts addressing this issue have held that a decision issued by a multi-member panel must be vacated if a biased member participated in the decision; however, there

are conflicting authorities. *See Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (3rd Cir. 1941) (stating "[l]itigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured"); *Cinderella Career and Finishing Schools v. Federal Trade Comm'n*, 138 U.S. App. D.C. 152, 425 F.2d 583, 592 (D.C. Cir. 1970) (vacating and remanding agency decision "despite the fact that former Chairman Dixon's vote was not necessary for a majority and stating there is no way of determining the extent to which one biased member's views affect the deliberations of a supposedly impartial tribunal); *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) (concluding that the plaintiff could make out a due process claim by showing bias on the part of only one member of the tribunal); *Wilkerson v. Johnson*, 699 F.2d 325, 328-29 (6th Cir. 1983) (finding that license applicants were denied due process based on the bias of one member of a four person application board); *Antoniu v. Sec. Exch. Comm'n*, 877 F.2d 721, 726 (8th Cir. 1989) (vacating commission decision and remanding for de novo reconsideration, even though biased commissioner belatedly recused himself and did not vote on final decision); *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) (vacating unanimous decision because of bias of one panel member; "plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members"); *but see*, *Bradshaw v. McCotter*, 796 F.2d 100, 101 (5th Cir. 1986) (denying habeas relief and finding no prejudice as a result of the state appellate judge's alleged appearance of bias since the appellate judge's vote

was not controlling); *Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 825 F.2d 946, 949 (6th Cir. 1987) (en banc) (holding that if judge's recusal had been deemed retroactive, and if the panel decision had been reinstated without the full court having decided whether the panel decision was correct, any victory the plaintiff might have won in the district court on remand would almost certainly have proved Pyrrhic"). Appellate courts at the state level have also conflicted on the issue. *See, e.g. Johnson v. Sturdivant*, 295 Ark. 663B, 758 S.W.2d 415, 415-16 (1988) (order vacatur and recusing entire Arkansas Supreme Court for rehearing because one justice with a conflict of interest had participated in a 6-1 decision); *Powell v. Anderson*, 660 N.W.2d 107, 122-23 (Minn. 2003) (holding that authoring justice's participation in a case to which he was disqualified was not cured by the fact that two qualified judges joined his opinion); *but see, Goodheart v. Cassey*, 523 Pa. 188, 565 A.2d 757, 761-62 (1989) (holding that, even if two Pennsylvania Supreme Court justices hearing an earlier case had been improperly "interested," the judgment would not be vacated because the judges' participation was "mere surplusage" in the 6-1 decision).

Therefore, in order to clearly define the parameters of the Due Process Clause's requirement for neutrality in the context of a multimember tribunal, this Court should grant certiorari and consider the issue presented.

CONCLUSION

For the foregoing reasons, Petitioners, Blitz Holdings Corp. and GCM Corporation, Ltd, request the Court grant this petition for writ of certiorari.

Respectfully submitted.

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April 9, 2009

APPENDIX

Tab No.:

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C. Memorandum Opinion on Rehearing by the First Court of Appeals of Texas (May 8, 2008)

D. Order on Motion to Recuse by Justice Alcala (Dec. 20, 2007)

E. Memorandum Order Denying Motion for Rehearing by the First Court of Appeals of Texas (Jul. 28, 2008)

F. Memorandum Order Denying Motion for Reconsideration En Banc by the First Court of Appeals of Texas (Jul. 28, 2008)

G. Order from the Texas Supreme Court Denying Petition for Review (Nov. 14, 2008)

H. Order from the Texas Supreme Court Denying Motion for Rehearing of Petition for Review (Jan. 9, 2009)

App. A

BLITZ HOLDINGS CORPORATION AND GCM CORPORATION, LTD., Appellants v. GRANT THORNTON, LLP AND DELOITTE & TOUCHE, LLP, Appellees

NO. 01-04-00627-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2007 Tex. App. LEXIS 4105

May 24, 2007, Opinion Issued

SUBSEQUENT HISTORY: Substituted opinion at, Opinion withdrawn by, Rehearing granted by *Blitz Holdings Corp. v. Grant Thornton, LLP, 2007 Tex. App. LEXIS 8546 (Tex. App. Houston 1st Dist., Oct. 25, 2007)*

PRIOR HISTORY: [*1] On Appeal from the 280th District Court, Harris County, Texas. Trial Court Cause No. 2001-38158.

JUDGES: Panel consists of Chief Justice Radack and Justices Jennings and Alcala.

OPINION BY: Elsa Alcala

OPINION

MEMORANDUM OPINION

Appellants, GCM Corporation, Ltd. and Blitz Holdings Corporation, [1] appeal from a take-nothing judgment rendered in favor of appellees, Grant Thornton LLP (Grant) and Deloitte & Touche LLP (Deloitte). This case concerns audit reports prepared by Grant and business valuations prepared by Deloitte, of corporations, IFS Financial Holdings Corporation (IFS) and Interamericas Financial Holdings Corporation (Interamericas), that were indebted to GCM. GCM contends that by relying on the erroneous information in these reports about the financial condition of IFS and Interamericas, GCM did not foreclose on the debt and instead restructured the debt, which caused GCM to ultimately lose $ 74 million when the debt was not paid after the restructure. The trial court granted a partial summary judgment in favor of Deloitte, and, at trial, directed verdicts in favor of Grant and Deloitte.

1 Blitz sought no independent relief in the case, but sued as a "necessary party."

[*2] In its third issue, GCM challenges the trial court's directed verdict in favor of Grant and Deloitte on all of GCM's claims, asserting that GCM produced more than a scintilla of evidence to prove the damages that it would have recovered had it foreclosed on the debt in either October 1999 or March 2000 instead of restructuring the debt. In its eleventh issue, GCM asserts that the trial court erred by rendering partial summary judgment in favor of Deloitte by determining that the 2000 IFS Note was not a security as a matter of law under the Texas Securities Act. *See TEX. REV. CIV. STAT. ANN. arts. 581-1 to 581-43* (Vernon 1964 & Supp. 2006). We affirm the judgment of the trial court.

Factual Background

GCM was a company in the business of assisting Mexican nationals make investments in the United States. GCM took the funds that it received from these investors and loaned the money, an amount that totaled approximately $ 95 million in December 1998, to IFS and Interamericas, the parent company of IFS. Of this total amount, IFS owed GCM $ 18.2 million pursuant to the terms of a "Basic Agreement," which was ultimately paid in full. The remaining [*3] loan by GCM was with Interamericas for a total of $ 76 million for five promissory notes pursuant to a "Credit Agreement."

Interamericas secured its indebtedness by an "Agreement Concerning Collateral" that provided that Interamericas pledged shares of stock in IFS, IFS pledged shares of stock in one of its subsidiaries, and Hugo Pimienta pledged 64% of the outstanding voting shares in IFS. Pimienta was the principal owner and investor of IFS, Interamericas, and related companies. The agreements specifically required the value of the collateral to meet what the parties refer to as the "market value ratio" and the "book value ratio." [2] Further, the agreements required that the market value of the shares be determined by Marshall & Stevens, Incorporated or "by an appraisal firm selected by [GCM] and acceptable to [Interamericas]." The book value of the stock was to be determined "on the basis of IFS's audited financial statements prepared in accordance with [Generally Accepted Accounting Principles] as of the end of the immediately preceding fiscal year." The first payments for these debts were due October 31, 1999. Before the first payments were due, however, IFS and

Interamericas [*4] filed suit and obtained a temporary restraining order preventing GCM from accelerating the debt or foreclosing on the collateral.

2 The market value ratio required that the market value of the pledged shares of IFS stock be at least 1.5 times the total debt owed by Interamericas and IFS to GCM. The book value ratio required that the book value of the stock be at least 1.3 times the total debt.

October 1999 Restructure that Relied on Audits for 1998 by Grant

After the lawsuit was filed in 1999, GCM entered into settlement negotiations with IFS and Interamericas, which resulted in the October 1999 debt restructure. Under the debt restructure in October 1999, Interamericas and IFS agreed to pay GCM $ 2 million upon execution of the agreement, $ 18 million by December 3, 1999, and $ 12 million by January 31, 2000. Interamericas and IFS paid the first two payments that totaled $ 20 million, but missed the third payment of $ 12 million that was due January 31, 2000.

In deciding to enter into the [*5] October 1999 restructure of the indebtedness, GCM relied on Grant's audits of the financial statements of Interamericas and IFS for the year ending December 31, 1998, that showed that the required book value ratio was not met by Interamericas and IFS. Although GCM was aware that the 1998 audits showed that the book value ratio was not met, GCM opted not to foreclose based on the book value deficiency because it had waived the book value ratio. Jorge Hollander, a member of GCM's advisory committee, testified that GCM waived the required book value ratio "since the

beginning until April 2000." The failure of Interamericas and IFS to meet the book value ratio was known by GCM, and the deficiency was waived by GCM when the debt was restructured in October 1999.

After the October 1999 restructure of the debt, Grant again audited Interamericas and IFS for the year 1999. In this second audit, Grant discovered a $ 44 million "management fee" that was paid in December 1999 by IFS to a related entity. IFS asserted that the payment was for services that had been performed over several years. Based on the newly-reported management fee, Grant added a note to the 1999 audit statements that it [*6] was restating the 1998 book value at $ 119 million, instead of the value that was originally reported at $ 143 million. The audit statements also show that the December 1999 book value of IFS was just under $ 135 million. The management fee charge of $ 44 million was "made known" to Grant by February 21, 2000. Grant, however, did not inform GCM of the change in its audit for 1998 until June 2000.

March 2000 Restructure that Relied on Audits by Grant and Appraisals by Deloitte

In early 2000, IFS hired Deloitte to perform a valuation of the market value of the pledged stock "in accordance with the terms of the Agreement Concerning Collateral." Deloitte's proposal to provide services to IFS expressly stated that Deloitte was entitled to rely on and would not independently verify information provided to it by IFS. Deloitte's first valuation of IFS's stock was based on the value as of October 31, 1999.

GCM filed a lawsuit against Interamericas and IFS after they failed to pay the $ 12 million due

January 31, 2000, and settlement negotiations ensued. During the settlement negotiations concerning the lawsuit, GCM received information in March 2000 that the valuation by Deloitte [*7] was that IFS's stock was valued at around $ 153 million on October 31, 1999. Although GCM was aware that the value of IFS's stock on October 31, 1999 was below the required market value ratio, GCM did not pursue the default, opting instead to settle the dispute on March 21, 2000. The settlement provided that GCM would receive the $ 12 million payment and the debt would again be restructured.

The restructure involved the exchange of promissory notes on May 24, 2000. As part of the restructuring, Blitz, a Panamanian corporation, was formed for the sole purpose of holding the IFS debt. Under a "Commercial Loan Agreement" between Blitz and IFS, Blitz loaned $ 74 million to IFS for the specific purpose of IFS purchasing all of Interamericas's indebtedness to GCM. At the same time, GCM loaned Blitz $ 74 million. Under the terms of the agreement between Blitz and GCM, Blitz would pay GCM when IFS paid Blitz. Thus, as of May 24, 2000, Interamericas was no longer a party to any indebtedness; IFS owed $ 74 million to Blitz; and Blitz owed $ 74 million to GCM. The agreements and notes between GCM and Interamericas and IFS were no longer in effect.

Depletion of the IFS and Interamericas [*8] ***Assets***

In the months immediately preceding the March 2000 restructure that included the formation of Blitz, IFS and Interamericas depleted a significant amount of assets. Mark Schwartz, an expert for GCM, testified that in late 1999 to early 2000, IFS moved sig-

nificant amounts of money into other entities, mostly offshore entities, that never came back through loans or transfers. Because of the depletion of the IFS assets, by March 2000, according to GCM's expert, there was "no way" GCM was going to recover all of its money.

The Lawsuit by Blitz Against IFS

After the decision to restructure the debt was made in March 2000 by transferring the IFS debt to Blitz, Blitz sued IFS three months later, in June 2000, and obtained a temporary restraining order prohibiting IFS from transferring assets. [3] On April 17, 2001, a federal district court granted a judgment against IFS and in favor of Blitz for $ 95 million for the promissory note, plus interest and attorney's fees. Only $ 2 million has been collected on the judgment due to the declaration of bankruptcy by IFS in August 2002. The effect of Blitz's uncollectible judgment against IFS is that Blitz is relieved of [*9] the duty to pay the promissory note it has with GCM because the terms of the agreement between Blitz and GCM were that Blitz would pay GCM only when IFS paid Blitz. Thus, although GCM has, through written documents, received "full satisfaction" of the debt with IFS by virtue of a promissory note from Blitz, GCM contends that the promissory note is not collectible under the terms of its agreement with Blitz because the terms provide that Blitz is excused from payment on the note until it is paid by IFS and IFS is bankrupt and unable to pay. GCM thus asserts that it has suffered a monetary loss of millions of dollars, despite the existence of a promissory note that outwardly appears to satisfy the debt.

3 After Blitz filed its lawsuit, GCM and Blitz received from Deloitte, on July 2000, Deloitte's business valuation of IFS "as of January 30, 2000," that showed that IFS had a significant value of $ 118 million. Later that year, in November 2000, GCM and Blitz received Deloitte's business valuation of IFS "as of June 30, 2000," which still showed a significant value of $ 48 million.

[*10] ***GCM's Claims Against Grant and Deloitte***

GCM brought suit against Grant and Deloitte, claiming that, if GCM had foreclosed on the debt instead of restructuring the debt, then it would have been able to recover at least some of the debt. Specifically, against Grant, GCM sought recovery for (1) "negligence/accounting malpractice," (2) common-law fraud, and (3) negligent misrepresentation. GCM also sought punitive damages for gross negligence or malice. There are two underlying bases of GCM's suit against Grant. First, GCM claims that Grant wrongfully failed to discover the $ 44 million management fee when it conducted the audit of the 1998 financial statements because even though the fee was not paid until December 1999, Grant's audit should have discovered the fee that, according to IFS, had been accruing over several years before it was paid. GCM contends that had Grant discovered the $ 44 million management fee and properly stated IFS's value for 1998 at $ 119 million instead of $ 143 million, GCM would not have entered into the October 1999 restructure of the debt because GCM would have had "more ammunition to fight in court for a foreclosure." Second, GCM contends [*11] that, once Grant actually learned of the fee, it wrongfully failed to inform GCM of its discovery until June 2000, when it was

too late to act on the information. According to GCM, had Grant informed GCM in February 2000 about the change in the December 1998 value of IFS, GCM would have sought foreclosure in March 2000, instead of restructuring the debt.

Against Deloitte, GCM sought recovery for (1) aiding and abetting violations of the Texas Securities Act, (2) negligence, (3) negligent misrepresentation, (4) conspiracy to commit fraud, (5) breach of fiduciary duty to a known third party, and (6) breach of contract (as the third-party beneficiary to the contract). GCM also sought punitive damages for malice and attorney's fees under the Texas Securities Act and *Texas Civil Practice and Remedies Code 38.001*. On appeal, GCM asserts that it also sued Deloitte for fraud.

In response to GCM's Texas Securities Act claims, Deloitte filed a motion for summary judgment on multiple grounds, including that the note was not a security as a matter of law, and the trial court granted the motion. The remaining claims were tried to a jury. Grant and Deloitte moved [*12] for a directed verdict, asserting that GCM had (1) failed to produce any evidence of damages because Blitz fully satisfied the IFS debt to GCM through a promissory note and therefore GCM had no standing to bring the suit; (2) failed to produce any evidence that a foreclosure in October 1999 or in March 2000 would have been successful in recovering any of the debt owed by IFS and Interamericas; and (3) failed to produce any evidence that GCM would have foreclosed earlier had it received all the information that it alleges it should have received. The trial court granted the direct verdict on these grounds, which pertain to every cause of action asserted by GCM.

Grant and Deloitte also made separate motions for directed verdict. Grant moved for a directed verdict on the ground that Grant's alleged wrongful acts did not cause GCM's harm because GCM had waived the book value ratio as a ground for default on the debt. Deloitte moved for a directed verdict on the grounds that (1) GCM's negligent misrepresentation claim against Deloitte failed because there was no evidence that the appraisal was "false" or that Deloitte made a misrepresentation for a known purpose, (2) there was no evidence [*13] that Deloitte conspired to commit fraud, (3) GCM had impermissibly "fractured" a claim for professional malpractice into multiple causes of action, (4) limitations barred claims against Deloitte, and (5) there was no evidence to support an award of punitive damages against Deloitte. The trial court granted both motions.

Directed Verdict on Damages

In its third issue, GCM contends that the trial court erred by granting the directed verdict against it on the element of damages, which it claims were proven through its expert Schwartz. Here, the trial court granted the directed verdict on the ground that GCM failed to produce any evidence that a foreclosure on the assets of IFS would have resulted in recovery of any of the debt owed by IFS and Interamericas to GCM. Grant and Deloitte assert that the evidence fails to show any damages caused to GCM by restructuring the debt instead of foreclosing on the debt. The parties do not dispute that IFS had assets in October 1999 and March 2000 that could have been used to satisfy at least some of the outstanding indebtedness to GCM. Thus, the dispute is

whether any evidence shows that, assuming GCM had foreclosed instead of restructuring [*14] the debt in either October 1999 or March 2000, the initiation of foreclosure proceedings against IFS by GCM in either October 1999 or March 2000 would have, in reasonable probability, been successful in recovering any of the IFS assets while they were still available.

In regard to Grant, GCM contends that, based on Grant's erroneous information about the 1998 book value of IFS, it suffered damages resulting from GCM's decision to restructure rather than foreclose in October 1999 and March 2000. In regard to Deloitte, GCM contends that, based on Deloitte's erroneous information about the 1999 market value of IFS, it suffered damages resulting from GCM's decision to restructure rather than foreclose in March 2000.

A. Directed Verdict Standard of Review

A directed verdict in favor of a defendant is proper when the plaintiff does not present evidence that raises a fact issue essential to the plaintiff's right of recovery or when the plaintiff admits or the evidence conclusively establishes a defense to the plaintiff's cause of action. *Prudential Ins. Co. v. Fin. Rev. Servs., 29 S.W.3d 74, 77 (Tex. 2000)*. In reviewing a directed verdict, the standards are the [*15] same as a legal sufficiency challenge. *City of Keller v. Wilson, 168 S.W.3d 802, 823 (Tex. 2005)*. We "[c]redit[] all favorable evidence that reasonable jurors could believe and disregard[] all contrary evidence except that which they could not ignore." *Id. at 830*. A directed verdict would be improper if the evidence is within a "zone of reasonable disagreement." *See id. at 822*. When a trial court directs a verdict

without stating the specific ground or grounds on which it is relying, the verdict must be upheld if any of the grounds stated in the motion for directed verdict are meritorious. *Prather v. Brandt, 981 S.W.2d 801, 805 (Tex. App.--Houston [1st Dist.] 1998, pet. denied).*

B. Proof of Damages

A plaintiff must produce some evidence from which the fact finder could reasonably infer that the damage sued for has resulted from the conduct of the defendant. *McKnight v. Hill & Hill Exterminators, Inc., 689 S.W.2d 206, 209 (Tex. 1985).* The evidence of damages must be based on more than a "suspicion or surmise." *Id.* "Uncertainty as to the fact of legal damages is fatal to recovery, [*16] but uncertainty as to the amount will not defeat recovery." *Id.* Damages that are "remote, contingent, and not . . . a proximate result of the acts of which complaint is made" may not be recovered. *Miller v. Bank of Commerce, 387 S.W.2d 691, 691-92 (Tex. Civ. App.--Fort Worth 1965, no writ)* (holding "actual damage could be no more than a matter of conjecture" under circumstances showing that defendant induced creditor to delay in collecting on debt and delay later barred creditor's claim because defendant filed bankruptcy).

To prove damages, the plaintiff must produce evidence that the defendant's conduct "caused an event and that event caused the plaintiff to suffer compensable damages." *See Keo v. Vu, 76 S.W.3d 725, 731 (Tex. App.--Houston [1st Dist.] 2002, pet. denied); see also Sunshine Mining and Refining Co. v. Ernst & Young, L.L.P., 114 S.W.3d 48, 52 (Tex. App.--Eastland 2003, no pet.)* (holding that there was no causal link between auditor's actions and company's

damages because "there must be some evidence that the spring stock offering would have been successful in order for [the company] to establish the causal link [*17] for the damages it seeks"). Proof of actual damages must be based on objective facts or data and must be more than conjecture. *See Carter v. Steverson & Co., 106 S.W.3d 161, 165-66 (Tex. App.--Houston [1st Dist.] 2003, pet. denied)* (noting that lost profits damages must be based on objective facts or data, not speculative or uncertain evidence).

A directed verdict, however, is improper if the plaintiff produces some evidence of a reasonable basis for determining his loss, even if the exact amount is not ascertainable or contradicted by other evidence. *See Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 484 (Tex. 1984); Field v. AIM Mgmt. Group, Inc., 845 S.W.2d 469, 471-72 (Tex. App.--Houston [14th Dist.] 1993, no writ).*

We must determine, therefore, whether there is any evidence in the record that shows the amount of money that GCM would in reasonable probability have recovered had it started foreclosure proceedings in October 1999 or March 2000, instead of renegotiating the debt. *See McKnight, 689 S.W.2d at 209.*

C. The Evidence

Schwartz testified that IFS assets were available [*18] in October 1999 and March 2000 if foreclosure on those assets had been accomplished at that time. [4] Schwartz said that "the amount of assets that could have been realized by GCM had it foreclosed on IFS in October 1999 was approximately $ 77.3 million." Schwartz also testified that the "most conservative" number for GCM's possible recovery from IFS's as-

sets was $ 67.5 million, which was based on the percentage of outstanding shares that IFS had actually pledged to GCM. These IFS assets included approximately $ 19 million in cash in October 1999. Schwartz testified that on October 31, 1999, IFS and Interamericas "had sufficient moneys and would have had sufficient moneys to pay the debt to GCM."

4 Schwartz testified as follows:

[Attorney]: What we put in front of the jury with respect to March is your expert opinion as to what could have been acquired, foreclosed?

[Schwartz]: Had GCM - -

[Attorney]: If GCM had exercised its right to foreclose, this is the amount of money you would have expected to recover from the assets?

[Schwartz]: Yes.

[Attorney]: And the same is true for October. If they had seized the assets in October?

[Schwartz]: Yes.

[*19] On December 31, 1999, IFS had a net value of $ 143 million, as shown in Grant's audit, and one month later, on January 31, 2000, IFS had a fair market value of $ 118 million, as shown in Deloitte's appraisal. During the period of time between late 1999 and early 2000, significant assets valued between $ 90 and $ 150 million were depleted from IFS and placed into mostly offshore accounts, with no return in assets to IFS, according to Schwartz. Schwartz testified that, in his review of documents and information provided by GCM's attorneys and Hollander, he "saw evidence of assets moving out and not coming back in the system" beginning in late 1999 and early 2000. [5]

5 Schwartz gave examples of how the money was transferred out of IFS. Schwartz stated that IFS invested $ 24 million in a start-up company called Pueblo, by the spring of 2000, a lot of loans were made to a company called UNI, that $ 3 million was loaned to a company called Larce in February 2000, $ 13 million was loaned to a company called Southsea before March 2000, $ 4.5 million was loaned to a company called Northsea before March 2000, and the $ 44 million management fee was paid sometime in late 1999 or early 2000. Schwartz also testified that additional transfers were made after March 2000, although he did not identify specific transactions.

[*20] By the time of the March 2000 settlement and agreement to restructure the $ 74 million debt, Schwartz said that IFS had $ 29.9 million in "assets available." Schwartz arrived at the $ 29.9 million figure by deducting costs for collecting on the debt from the larger amount of $ 34 million in available assets. Of the $ 29.9 million in net assets, Schwartz said that only $ 13.3 million in assets would have been available if GCM had recovered "nothing but the value of the shares actually pledged." Schwartz reached the figure of $ 13.3 million by apparently accounting for the amount that would have been necessary to redeem the outstanding shares of preferred stock.

Because of the significant depletion of IFS assets, Schwartz acknowledged that by March 2000, "there was no way GCM was going to get all its money." Schwartz explained that by March 2000, GCM was in a "work-out situation," which he described as follows:

In a credit arrangement borrower/lender, when the loan, the operations of the business, begin to deteriorate and the loan performance, the ability to come to service the loan comes into question, you often find that the bank or lender will put the loan in work-out where [*21] they're trying to maximize the recovery and figure out a strategy that will get them repaid, because [sic] on other than the agreed terms, because the agreed terms, the loan's not going to repay. Any number of factors, the work-out can take out any number of different ways, debt for dividends, interest for bearers, renegotiation.

Schwartz acknowledged that in a work-out situation, "lenders frequently agree to things that they would not normally agree to in order to try to preserve some value" because "the lender is just trying to make the best of a bad situation." Schwartz agreed that "the lender may believe that over the long run they can recover more by restructuring than by incurring the cost of foreclosure and liquidation."

Schwartz related that IFS was no longer in operation as of March 2000 and the only source of payment that GCM would have had was through the sale of the assets of IFS. Schwartz explained that "when you are looking at essentially the assets to pay off the debt, the value of those assets and their retention of value becomes critical to your recovery." Schwartz testified that he was determining the "value of the assets available to pay the debt or at [*22] least pay some on the debt." Schwartz said he was "looking at just generally the availability of assets to pay the debt." Schwartz acknowledged that he was not offering an opinion on what GCM might have realized by

foreclosing on the shares and attempting to liquidate IFS's assets, but only that there was value in IFS.

D. Analysis

GCM asserts that it has produced some evidence of damages because (1) it would have become the majority shareholder if it had foreclosed on the stock of IFS; (2) IFS had assets available to satisfy some or all of the debt; and (3) Schwartz took the costs of collection of the debt into account when he gave his figures on the available amounts.

1. Majority Stockholder

GCM asserts that had it foreclosed on the IFS stock in October 1999 or March 2000, it would have become the majority stockholder of IFS and would have recovered not only the value of the stock, but it also could have liquidated IFS's assets to recover the debt owed. Schwartz, however, did not offer an opinion on the value of the collateral, the shares of IFS. Schwartz stated that he was not offering an opinion "as to the value of the IFS common stock as to any point in time. [*23] " Thus, there is no evidence of the value of the collateral--the shares of stock of IFS--in either October 1999 or March 2000.

GCM contends that regardless of the value of the stock of IFS, foreclosure on the collateral would make GCM the majority shareholder of IFS, and GCM could have then liquidated the assets of IFS to satisfy the debt. But even assuming that foreclosure proceedings would have enabled GCM to become the majority stockholder in IFS, GCM produced no evidence to show, in reasonable probability, that if it had succeeded at liquidating the assets, what the value of those assets would have been had the liqui-

dation occurred. Schwartz did not testify to what GCM would have realized by foreclosing and liquidating IFS's assets, but only that there was some value in IFS in October 1999 or March 2000, when foreclosure proceedings could have been initiated. GCM, thus, offered no evidence showing that a foreclosure initiated in late October 1999 or in March 2000 would have resulted in the recovery of any of the indebtedness.

No direct evidence shows that foreclosure proceedings would have resulted in GCM's capturing any of IFS's available assets, and the record does not support [*24] any such inference. To the contrary, the record suggests that assets could not have been reached through foreclosure proceedings beginning in October 1999 or March 2000. In October 1999, GCM was in litigation with IFS and Interamericas, and there was an injunction in place preventing GCM from accelerating or foreclosing on the debt. To begin foreclosure in October 1999, GCM would have had to first convince the court to lift the injunction to allow the foreclosure proceedings that were prohibited. Even assuming that GCM could have convinced the court to lift the injunction to allow the foreclosure to proceed, no evidence shows, in reasonable probability, what would have been the result of foreclosure proceedings.

The direct evidence from GCM's advisory committee member Hollander also suggests that it would not be reasonable to infer that foreclosure could have actually resulted in the acquisition of the assets of IFS. Hollander testified that one of the reasons that he restructured in October 1999 instead of foreclosing was that the types of default that existed, namely the non-compliance with the book value ratio and IFS's

delinquency in producing monthly unaudited financial statements, [*25] were not the types of defaults that would cause a court to turn over control of IFS by foreclosing on the majority of outstanding shares of stock. Although knowledge of the $ 44 million restatement would have given GCM, in Hollander's words, "more ammunition to fight for a foreclosure," no evidence shows that the information would have resulted in a reasonable probability that GCM could have foreclosed on the IFS collateral. We cannot conclude that the evidence reasonably supports an inference that foreclosure proceedings initiated by GCM in October 1999 could have resulted in GCM's ability to capture any amount of IFS's assets.

By March 2000, the assets of IFS were significantly depleted, and no evidence shows in reasonable probability what the result of foreclosure proceedings started in March 2000 would have been. As noted by Deloitte,

The relevant issue was not the value of IFS's realizable assets on March 31, 2000, a mere nine days after Deloitt's first valuation was delivered, but rather the value of realizable assets on March 21, 2000 following the conclusion of any foreclosure proceedings that GCM might have instituted and the conversion of its resulting stock ownership [*26] into possession of liquid assets. That date, almost certainly, would have been months after March 31, 2000. GCM's argument that Deloitte's second valuation concluded that the fair market value of IFS was $ 118 million as of January 31, 2000, is irrelevant. Given the rapidity with which IFS was disposing of assets in early 2000, the company's value on January 31, 2000, indicated very little about its value on

March 31, 2000, and even less on some unknown future date when GCM's hypothetical foreclosure proceedings would have been concluded.

To support their contention that it is not reasonable to infer that damages resulted from the decision not to foreclose, Deloitte and Grant note the events of June 2000, when Blitz attempted to foreclose on the IFS debt. When Blitz took over the debt of IFS from GCM in May 2000, Blitz attempted to foreclose on the IFS debt. On June 30, 2000, Blitz initiated an arbitration procedure seeking foreclosure and filed a federal lawsuit, obtaining a temporary restraining order forbidding IFS from transferring assets. Despite the initiation of foreclosure proceedings by Blitz and the restraining order against IFS, IFS's primary shareholder Pimienta transferred [*27] almost $ 62 million in assets out of IFS, according to Hollander. Hollander, however, continued to negotiate with IFS during the pendency of the arbitration and the lawsuit. Blitz finally obtained a judgment against IFS in April 2001, but by that time, the judgment was uncollectible. Here, there is simply no evidence that a foreclosure would have been any more successful at recovering any of the IFS debt than the restructure of the debt.

2. Assets Available

There is evidence that IFS had recoverable assets available in October 1999 and March 2000. The record is silent, however, on whether, in reasonable probability, any of the available assets could have been recovered had GCM decided to initiate foreclosure proceedings on the IFS debt in either October

1999 or March 2000, rather than restructure the debt. As discussed more fully above, the collateral for IFS's indebtedness was stock in IFS, not in the underlying assets, and no evidence connects foreclosure on those shares with an ability to collect any amount of assets that was available in October 1999 or March 2000. We conclude that the mere fact that IFS had assets available in October 1999 or March 2000 does not establish [*28] that in reasonable probability any amount of those assets could have been actually recovered by foreclosure proceedings initiated on those dates.

3. Cost of Foreclosure

GCM asserts that Schwartz testified about the costs of foreclosure, discounts to be applied to any assets, and the "steps that Plaintiffs were required to take in order to foreclose." Schwartz did not testify about the necessary steps for foreclosure on assets or the reasonable probability of GCM's ability to collect any amount through the foreclosure proceedings. Although Schwartz estimated the costs of collection for a foreclosure in March 2000, [6] he did not describe how any amount of the assets could have been obtained by foreclosure proceedings that began in October 1999 or March 2000. Although Schwartz testified that he deducted the costs of foreclosure from the available amount of assets, his testimony constitutes no evidence of the actual damages incurred by GCM as a result of not foreclosing in October 1999 or March 2000.

6 Schwartz merely reduced the value of the assets that he said were available from approximately $ 34 million to $ 29.9 million. He did not explain why he

chose that amount. Schwartz did not offer any testimony on the amount for costs of foreclosure in October 1999.

[*29] **4. Conclusion**

GCM stated its theory of damages to the trial court as follows:

> We are trying to collect the money that GCM would have had if it had chosen to foreclose in October, or it had later chose[n] to foreclose in March. That is what we are trying to recover.

GCM, however, did not prove any amount of money that it would have recovered had it sought foreclosure in October 1999 or March 2000. It is undisputed that when Blitz attempted to foreclose on the debt in June 2000, IFS actually transferred its assets to other entities in violation of the court order and then declared bankruptcy, making the debt uncollectible. GCM failed to produce any evidence that foreclosure proceedings initiated three months earlier in March 2000 or nine months earlier in October 1999 would have enabled it to acquire any assets of IFS. Even if GCM had opted to foreclose and began foreclosure proceedings on the collateral of IFS, there is no evidence in the record that any such foreclosure would have actually resulted in GCM's ability to take possession of the majority stock of IFS, or the value of that stock. Furthermore, even if GCM had taken possession of the stock to become the [*30] majority shareholder, there is no evidence that any assets would have been reached through liquidation of the IFS assets when that would have occurred at some

time following the foreclosure proceedings. *See Sunshine Mining and Refining Co., 114 S.W.3d at 52; Keo, 76 S.W.3d at 731.*

Thus, GCM presented no evidence of any damages resulting its decisions in October 1999 and March 2000 to restructure IFS's debt. GCM presented no basis for a jury to determine, with reasonable certainty, the amount of "money that GCM would have had if it had chosen to foreclose." *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 50 (Tex. 1998)* (holding that there was no evidence that plaintiff would have obtained contract had its bid been lower); *Szczepanik v. First S. Trust Co., 883 S.W.2d 648, 650 (Tex. 1994)* (holding that there was no evidence that plaintiff could have retained accounts for any period of time because account holders could transfer accounts at will); *Miller, 387 S.W.2d at 692* (holding that, because it was not certain creditor's effort to collect debt would have been [*31] successful, there was no evidence of damages). GCM's expert on damages, Schwartz, acknowledged that he was not offering an opinion on what GCM might have realized by foreclosing on the shares and attempting to liquidate IFS's assets. Accordingly, we hold that the trial court did not err by granting a directed verdict in favor of Grant and Deloitte on the ground that GCM presented no evidence of damages. *See City of Keller, 168 S.W.3d at 813* (noting that evidence is not legally sufficient "if jurors would have to guess whether a vital fact exists").

In support of its arguments, GCM relies on *Vance* and *Field*, but both cases are factually distinguishable. In those cases, the evidence established *some* amount for the damages, but here no evidence and no

reasonable inference from the evidence shows any amount of damages caused by GCM's decision not to foreclose. *See Vance, 677 S.W.2d at 484* (holding that directed verdict was improper on element of damages because some evidence showed reasonable basis for determining party's loss, even though exact amount of damages could not be ascertained and there was substantial conflict in evidence with [*32] regard to exact cost of repairs); *Field, 845 S.W.2d at 472* (holding that directed verdict was improper on element of damages because plaintiff recited amount for which stock could have been sold, stockbroker testified regarding probable value of stock, and AIM executive related how much eventually paid for plaintiff's AIM stock).

We overrule GCM's third issue.

GCM's Texas Securities Act Claims

In its eleventh issue, GCM contends that the trial court erred by granting summary judgment for Deloitte on GCM's claims for violations of the Texas Securities Act because the Commercial Loan Agreement is a security.

"If summary judgment may have been rendered, properly or improperly, on a ground not challenged, the judgment must be affirmed." *Ellis v. Precision Engine Rebuilders, Inc., 68 S.W.3d 894, 898 (Tex. App.--Houston [1st Dist.] 2002, no pet.)*; *see also Jacobs v. Satterwhite, 65 S.W.3d 653, 655 (Tex. 2001)* (holding appellate court may not reverse judgment on grounds not raised and argued on appeal); *San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 209-10 (Tex. 1990)* (same). That the CLA was not a security [*33] is only one of the grounds that Deloitte asserted as a basis for its motion for summary judg-

ment. GCM does not attack any other ground for summary judgment. We therefore affirm the summary judgment with respect to GCM's Texas Securities Act claims. *See Ellis, 68 S.W.3d at 898.*

We overrule GCM's eleventh issue. Having overruled GCM's third and eleventh issues, we need not reach GCM's first, second, [7] and fourth through tenth [8] issues, nor Grant's two cross-points. [9]

7 In its second issue, GCM challenges the trial court's directed verdict on the lack of proof of damages due to undisputed evidence that GCM transferred the debt to Blitz and that Blitz fully satisfied the debt with a promissory note to GCM for the entire amount of the debt owed by IFS to GCM. We do not reach this alternative argument that there is no proof of damages due to the full satisfaction of the IFS debt by the promissory note given to GCM by Blitz. To the extent that Deloitte and Grant contend that GCM lacks standing due to the promissory note from Blitz, we reject that challenge because the pleadings by GCM alleged that the erroneous information provided by Grant and Deloitte caused GCM to restructure the debt rather than to foreclose on the notes and that, had it foreclosed, it would have recovered something more than a worthless promissory note. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993)* (pleadings, viewed in favor of plaintiff, must allege facts that affirmatively demonstrate court's jurisdiction to hear case); *Cedar Crest Funeral Home, Inc. v. Lashley, 889 S.W.2d 325, 330 (Tex. App.--Dallas 1993, no writ)* (holding that pleadings that alleged injury from wrongful conduct showed plaintiffs had standing).

[*34]

8 In its first issue, GCM challenges the directed verdict in favor of Grant and Deloitte by asserting that it produced more than a scintilla of evidence that it was unnecessary to produce the other members of the advisory committee to establish that they would have voted to foreclose because Jorge Hollander and Malu McKee, through Gamma Capital Services, had the power to foreclose on IFS. In its fourth and fifth issues, which concern Grant only, GCM contends that it introduced more than a scintilla of evidence of Grant's fraud or negligence in failing to timely notify GCM of the 1999 change to the 1998 audit and that it could have foreclosed under other sections of the agreement, even if GCM had waived the "book value ratio." GCM's remaining issues, numbered six through 10, concern Deloitte only. GCM contends that it produced some evidence that Deloitte's business valuations were inaccurate and that Deloitte committed fraud and conspired to commit fraud with IFS. GCM also asserts that it did not impermissibly fracture its causes of action against Deloitte, that its claims against Deloitte are not barred by the statute of limitations, and that the evidence supports punitive damages.

[*35]

9 In its two cross-points, Grant challenges the trial court's denial of a directed verdict on its negligent misrepresentation claim on the grounds that (1) a negligent misrepresentation claim requires that the representation be made to a known party for a known purpose and that GCM did not rely on Grant's audits for a known purpose, and (2) there was no duty to disclose information under the facts of this case.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala

Justice

Panel consists of Chief Justice Radack and Justices Jennings and Alcala.

App. B

BLITZ HOLDINGS CORPORATION AND GCM CORPORATION, LTD., Appellants v. GRANT THORNTON, LLP AND DELOITTE & TOUCHE, LLP, Appellees

NO. 01-04-00627-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2007 Tex. App. LEXIS 8546

October 25, 2007, Opinion Issued

SUBSEQUENT HISTORY: Rehearing granted by, Opinion withdrawn by, Substituted opinion at *Blitz Holdings Corp. v. Grant Thornton, LLP, 2008 Tex. App. LEXIS 3315 (Tex. App. Houston 1st Dist., May 8, 2008)*

PRIOR HISTORY: [*1]

On Appeal from the 280th District Court, Harris County, Texas. Trial Court Cause No. 2001-38158.

Blitz Holdings Corp. v. Grant Thornton, LLP, 2007 Tex. App. LEXIS 4105 (Tex. App. Houston 1st Dist., May 24, 2007)

JUDGES: Panel consists of Chief Justice Radack and Justices Jennings and Alcala.

OPINION BY: Elsa Alcala

OPINION

MEMORANDUM OPINION ON REHEARING

We issued an opinion in this case on May 24, 2007. Appellant, GCM Corporation, Ltd. (GCM), moved for a rehearing. After receiving a response from appellees, Grant Thornton, LLP (Grant) and Deloitte & Touche, LLP (Deloitte), we grant rehearing, withdraw our opinion, vacate our judgment of May 24, 2007, and issue this opinion in its stead.

Appellants, GCM and Blitz Holdings Corporation, [1] appeal from a take-nothing judgment rendered in favor of Grant and Deloitte. This case concerns audit reports prepared by Grant and business valuations prepared by Deloitte, of corporations, IFS Financial Holdings Corporation (IFS) and Interamericas Financial Holdings Corporation (Interamericas), that were indebted to GCM. GCM contends that by relying on the erroneous information in these reports about the financial condition of IFS and Interamericas, GCM did not foreclose on the debt and instead restructured the debt, which caused GCM to ultimately lose $ 74 million when the debt was not paid [*2] after the restructure. The trial court granted a partial summary judgment in favor of Deloitte, and, at trial, directed verdicts in favor of Grant and Deloitte.

1 Blitz sought no independent relief in the case, but sued as a "necessary party."

In its third issue, GCM challenges the trial court's directed verdict in favor of Grant and Deloitte on all of GCM's claims, asserting that GCM produced more than a scintilla of evidence to prove the damages that it would have recovered had it foreclosed on the debt in either October 1999 or March 2000 instead of re-

structuring the debt. In its eleventh issue, GCM asserts that the trial court erred by rendering partial summary judgment in favor of Deloitte by determining that the 2000 IFS Note was not a security as a matter of law under the Texas Securities Act. *See TEX. REV. CIV. STAT. ANN. arts. 581-1 to 581-43* (Vernon 1964 & Supp. 2006). We affirm the judgment of the trial court.

Factual Background

GCM was a company in the business of assisting Mexican nationals to make investments in the United States. GCM took the funds that it received from these investors and loaned the money, an amount that totaled approximately $ 95 million in December 1998, [*3] to IFS and Interamericas, the parent company of IFS. Of this total amount, IFS owed GCM $ 18.2 million pursuant to the terms of a "Basic Agreement," which was ultimately paid in full. The remaining loan by GCM was with Interamericas for a total of $ 76 million for five promissory notes pursuant to a "Credit Agreement."

Interamericas secured its indebtedness by an "Agreement Concerning Collateral" that provided that Interamericas pledged shares of stock in IFS, IFS pledged shares of stock in one of its subsidiaries, and Hugo Pimienta pledged 64% of the outstanding voting shares in IFS. Pimienta was the principal owner and investor of IFS, Interamericas, and related companies. The agreements specifically required the value of the collateral to meet what the parties refer to as the "market value ratio" and the "book value ratio." [2] Further, the agreements required that the market value of the shares be determined by Marshall & Stevens, Incorporated or "by an

appraisal firm selected by [GCM] and acceptable to [Interamericas]." The book value of the stock was to be determined "on the basis of IFS's audited financial statements prepared in accordance with [Generally Accepted Accounting Principles] [*4] as of the end of the immediately preceding fiscal year." The first payments for these debts were due October 31, 1999. Before the first payments were due, however, IFS and Interamericas filed suit and obtained a temporary restraining order preventing GCM from accelerating the debt or foreclosing on the collateral.

2 The market value ratio required that the market value of the pledged shares of IFS stock be at least 1.5 times the total debt owed by Interamericas and IFS to GCM. The book value ratio required that the book value of the stock be at least 1.3 times the total debt.

October 1999 Restructure that Relied on Grant's Audits for 1998

After the lawsuit was filed in 1999, GCM entered into settlement negotiations with IFS and Interamericas, which resulted in the October 1999 debt restructure. Under the debt restructure in October 1999, Interamericas and IFS agreed to pay GCM $ 2 million upon execution of the agreement, $ 18 million by December 3, 1999, and $ 12 million by January 31, 2000. Interamericas and IFS paid the first two payments that totaled $ 20 million, but missed the third payment of $ 12 million that was due January 31, 2000.

In deciding to enter into the October 1999 restructure [*5] of the indebtedness, GCM relied on Grant's audits of the financial statements of Interamericas and IFS for the year ending December 31, 1998, that

showed that the required book value ratio was not met by Interamericas and IFS. Although GCM was aware that the 1998 audits showed that the book value ratio was not met, GCM opted not to foreclose based on the book value deficiency because it had waived the book value ratio. Jorge Hollander, a member of GCM's advisory committee, testified that GCM waived the required book value ratio "since the beginning until April 2000." The failure of Interamericas and IFS to meet the book value ratio was known by GCM, and the deficiency was waived by GCM when the debt was restructured in October 1999.

After the October 1999 restructure of the debt, Grant again audited Interamericas and IFS for the year 1999. In this second audit, Grant discovered a $ 44 million "management fee" that was paid in December 1999 by IFS to a related entity. IFS asserted that the payment was for services that had been performed over several years. Based on the newly-reported management fee, Grant added a note to the 1999 audit statements that it was restating the 1998 book [*6] value at $ 119 million, instead of the value that was originally reported at $ 143 million. The audit statements also show that the December 1999 book value of IFS was just under $ 135 million. The management fee charge of $ 44 million was "made known" to Grant by February 21, 2000. Grant, however, did not inform GCM of the change in its audit for 1998 until June 2000.

March 2000 Restructure that Relied on Grant's Audits and Deloitte's Valuations

In early 2000, IFS hired Deloitte to perform a valuation of the market value of the pledged stock "in accordance with the terms of the Agreement Con-

cerning Collateral." Deloitte's proposal to provide services to IFS expressly stated that Deloitte was entitled to rely on and would not independently verify information provided to it by IFS. Deloitte's first valuation of IFS's stock was based on the value as of October 31, 1999.

GCM filed a lawsuit against Interamericas and IFS after they failed to pay the $ 12 million due January 31, 2000, and settlement negotiations ensued. During the settlement negotiations, GCM received information in March 2000 that the valuation by Deloitte was that IFS's stock was valued at around $ 153 million on October [*7] 31, 1999. Although GCM was aware that the value of IFS's stock on October 31, 1999, was below the required market value ratio, GCM did not pursue the default, opting instead to settle the dispute on March 21, 2000. The settlement provided that GCM would receive the $ 12 million payment and the debt would again be restructured.

The restructure involved the exchange of promissory notes on May 24, 2000. As part of the restructuring, Blitz, a Panamanian corporation, was formed for the sole purpose of holding IFS's debt. Under a "Commercial Loan Agreement" between Blitz and IFS, Blitz loaned $ 74 million to IFS for the specific purpose of IFS purchasing all of Interamericas's indebtedness to GCM. At the same time, GCM loaned Blitz $ 74 million. Under the terms of the agreement between Blitz and GCM, Blitz would pay GCM when IFS paid Blitz. Thus, as of May 24, 2000, Interamericas was no longer a party to any indebtedness; IFS owed $ 74 million to Blitz; and Blitz owed $ 74 million to GCM. The agreements and notes between

GCM and Interamericas and IFS were no longer in effect.

Depletion of IFS's and Interamericas's Assets

In the months immediately preceding the March 2000 restructure that included [*8] the formation of Blitz, IFS and Interamericas depleted a significant amount of assets. Mark Schwartz, an expert for GCM, testified that in late 1999 to early 2000, IFS moved significant amounts of money into other entities, mostly offshore entities, that never came back through loans or transfers. Because of the depletion of IFS's assets, by March 2000, according to GCM's expert, there was "no way" GCM was going to recover all of its money.

The Lawsuit by Blitz Against IFS

After the decision to restructure the debt was made in March 2000 by transferring IFS's debt to Blitz, Blitz sued IFS three months later, in June 2000, and obtained a temporary restraining order prohibiting IFS from transferring assets. [3] On April 17, 2001, a federal district court granted a judgment against IFS and in favor of Blitz for $ 95 million for the promissory note, plus interest and attorney's fees. Only $ 2 million has been collected on the judgment due to the declaration of bankruptcy by IFS in August 2002. The effect of Blitz's uncollectible judgment against IFS is that Blitz is relieved of the duty to pay the promissory note it has with GCM because the terms of the agreement between Blitz and GCM were [*9] that Blitz would pay GCM only when IFS paid Blitz. Thus, although GCM has, through written documents, received "full satisfaction" of the debt with IFS by virtue of a promissory note from Blitz, GCM contends that the promissory note is not collectible under the terms of its agreement with Blitz

because the terms provide that Blitz is excused from payment on the note until it is paid by IFS and IFS is bankrupt and unable to pay. GCM thus asserts that it has suffered a monetary loss of millions of dollars, despite the existence of a promissory note that outwardly appears to satisfy the debt.

3 After Blitz filed its lawsuit, GCM and Blitz received from Deloitte, on July 2000, Deloitte's business valuation of IFS "as of January 30, 2000," which showed that IFS had a significant value of $ 118 million. Later that year, in November 2000, GCM and Blitz received Deloitte's business valuation of IFS "as of June 30, 2000," which still showed a significant value of $ 48 million.

GCM's Claims Against Grant and Deloitte

GCM brought suit against Grant and Deloitte, claiming that, if GCM had foreclosed on the debt instead of restructuring the debt, then it would have been able to recover at least some [*10] of the debt. Specifically, against Grant, GCM sought recovery for (1) "negligence/accounting malpractice," (2) common-law fraud, and (3) negligent misrepresentation. GCM also sought punitive damages for gross negligence or malice. There are two underlying bases of GCM's suit against Grant. First, GCM claims that Grant wrongfully failed to discover the $ 44 million management fee when it conducted the audit of the 1998 financial statements because, even though the fee was not paid until December 1999, Grant's audit should have discovered the fee that, according to IFS, had been accruing over several years before it was paid. GCM contends that had Grant discovered the $ 44 million management fee and properly stated IFS's value for 1998 at $ 119 million instead of $ 143 million, GCM

would not have entered into the October 1999 restructure of the debt because GCM would have had "more ammunition to fight in court for a foreclosure." Second, GCM contends that, once Grant actually learned of the fee, it wrongfully failed to inform GCM of its discovery until June 2000, when it was too late to act on the information. According to GCM, had Grant informed GCM in February 2000 about the change [*11] in the December 1998 value of IFS, GCM would have sought foreclosure in March 2000, instead of restructuring the debt.

Against Deloitte, GCM sought recovery for (1) aiding and abetting violations of the Texas Securities Act, (2) negligence, (3) negligent misrepresentation, (4) conspiracy to commit fraud, (5) breach of fiduciary duty to a known third party, and (6) breach of contract (as the third-party beneficiary to the contract). GCM also sought punitive damages for malice and attorney's fees under the Texas Securities Act and *Texas Civil Practice and Remedies Code section 38.001*. On appeal, GCM asserts that it also sued Deloitte for fraud.

In response to GCM's Texas Securities Act claims, Deloitte filed a motion for summary judgment on multiple grounds, including that the note was not a security as a matter of law, and the trial court granted the motion. The remaining claims were tried to a jury. Grant and Deloitte moved for a directed verdict, asserting that GCM had (1) failed to produce any evidence of damages because Blitz fully satisfied IFS's debt to GCM through a promissory note and therefore GCM had no standing to bring the suit; (2) failed to produce any evidence that a foreclosure [*12] in October 1999 or in March 2000 would have been successful in recovering any of the debt owed by

IFS and Interamericas; and (3) failed to produce any evidence that GCM would have foreclosed earlier had it received all the information that it alleges it should have received. The trial court granted the direct verdict on these grounds, which pertain to every cause of action asserted by GCM.

Grant and Deloitte also made separate motions for directed verdict. Grant moved for a directed verdict on the ground that Grant's alleged wrongful acts did not cause GCM's harm because GCM had waived the book value ratio as a ground for default on the debt. Deloitte moved for a directed verdict on the grounds that (1) GCM's negligent misrepresentation claim against Deloitte failed because there was no evidence that the valuation was "false" or that Deloitte made a misrepresentation for a known purpose, (2) there was no evidence that Deloitte conspired to commit fraud, (3) GCM had impermissibly "fractured" a claim for professional malpractice into multiple causes of action, (4) limitations barred claims against Deloitte, and (5) there was no evidence to support an award of punitive damages against [*13] Deloitte. The trial court granted both motions.

Directed Verdict on Damages

In its third issue, GCM contends that the trial court erred by granting the directed verdict against it on the element of damages, which it claims were proven through its expert Schwartz. [4] The trial court granted the directed verdict on the ground that GCM failed to produce any evidence that a foreclosure on IFS's assets would have resulted in recovery of any of the debt owed by IFS and Interamericas to GCM. [5] Grant and Deloitte assert that the evidence fails to

show any damages caused to GCM by restructuring the debt instead of foreclosing on the debt. The parties do not dispute that IFS had assets in October 1999 and March 2000 that could have been used to satisfy at least some of the outstanding indebtedness to GCM. Thus, the dispute is whether any evidence shows that, assuming GCM had foreclosed instead of restructuring the debt in either October 1999 or March 2000, the initiation of foreclosure proceedings against IFS by GCM in either October 1999 or March 2000 would have, in reasonable probability, been successful in recovering any of the IFS's assets while they were still available.

4 Deloitte moved for [*14] directed verdict on this ground asserting that "there is no competent, credible evidence of what amount of money would have been collected had" GCM attempted to foreclose in October or March and, therefore, "there is no evidence that the jury could conclude what the damages are." Grant joined in this motion.

5 At the hearing on the directed verdict, the trial court stated, "Actually, you've got no evidence as I recall of any of your experts saying what would have been recovered."

In regard to Grant, GCM contends that, based on Grant's erroneous information about IFS's 1998 book value, it suffered damages resulting from GCM's decision to restructure rather than foreclose in October 1999 and March 2000. In regard to Deloitte, GCM contends that, based on Deloitte's erroneous information about the 1999 market value of IFS, it suffered damages resulting from GCM's decision to restructure rather than foreclose in March 2000.

A. Directed Verdict Standard of Review

A directed verdict in favor of a defendant is proper when the plaintiff does not present evidence that raises a fact issue essential to the plaintiff's right of recovery, or when the plaintiff admits or the evidence conclusively establishes [*15] a defense to the plaintiff's cause of action. *Prudential Ins. Co. v. Fin. Rev. Servs. Inc., 29 S.W.3d 74, 77 (Tex. 2000).* In reviewing a directed verdict, the standards are the same as a legal sufficiency challenge. *City of Keller v. Wilson, 168 S.W.3d 802, 823 (Tex. 2005).* We "[c]redit[] all favorable evidence that reasonable jurors could believe and disregard[] all contrary evidence except that which they could not ignore." *Id. at 830.* A directed verdict would be improper if the evidence is within a "zone of reasonable disagreement." *See id. at 822.* When a trial court directs a verdict without stating the specific ground or grounds on which it is relying, the verdict must be upheld if any of the grounds stated in the motion for directed verdict is meritorious. *Prather v. Brandt, 981 S.W.2d 801, 805 (Tex. App.--Houston [1st Dist.] 1998, pet. denied).*

B. Proof of Damages

A plaintiff must produce some evidence from which the fact finder could reasonably infer that the damage sued for has resulted from the conduct of the defendant. *McKnight v. Hill & Hill Exterminators, Inc., 689 S.W.2d 206, 209 (Tex. 1985).* The evidence of damages must be based on more than a "suspicion or surmise." *Id.* [*16] "Uncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery." *Id. at 207.*

Damages that are "remote, contingent, and not . . . a proximate result of the acts of which complaint is made" may not be recovered. *Miller v. Bank of Commerce, 387 S.W.2d 691, 691--92 (Tex. Civ. App.--Fort Worth 1965, no writ)* (holding "actual damage could be no more than a matter of conjecture" under circumstances showing that defendant induced creditor to delay in collecting on debt and delay later barred creditor's claim because defendant filed bankruptcy).

To prove damages, the plaintiff must produce evidence that the defendant's conduct "caused an event and that event caused the plaintiff to suffer compensable damages." *See Keo v. Vu, 76 S.W.3d 725, 731 (Tex. App.--Houston [1st Dist.] 2002, pet. denied); see also Sunshine Mining and Refining Co. v. Ernst & Young, L.L.P., 114 S.W.3d 48, 52 (Tex. App.--Eastland 2003, no pet.)* (holding that there was no causal link between auditor's actions and company's damages because "there must be some evidence that the spring stock offering would have been successful in order for [the company] to establish [*17] the causal link for the damages it seeks"). Proof of actual damages must be based on objective facts or data and must be more than conjecture. *See Carter v. Steverson & Co., 106 S.W.3d 161, 165--66 (Tex. App.--Houston [1st Dist.] 2003, pet. denied)* (noting that lost profits damages must be based on objective facts or data, not speculative or uncertain evidence).

A directed verdict, however, is improper if the plaintiff produces some evidence of a reasonable basis for determining his loss, even if the exact amount is not ascertainable or contradicted by other evidence. *See Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 484 (Tex. 1984); Field v. AIM Mgmt. Group, Inc., 845 S.W.2d 469,*

471--72 (Tex. App.--Houston [14th Dist.] 1993, no writ).

We must determine, therefore, whether any evidence in the record shows, in reasonable probability, damages from GCM's decision to renegotiate the debt rather than to seek foreclosure proceedings in October 1999 or March 2000. *See McKnight, 689 S.W.2d at 209.*

C. The Evidence

Schwartz testified that IFS assets were available in October 1999 and March 2000 if foreclosure on those assets had been accomplished at that time. [6] Schwartz [*18] said that "the amount of assets that could have been realized by GCM had it foreclosed on IFS in October 1999 was approximately $ 77.3 million." Schwartz also testified that the "most conservative" number for GCM's possible recovery from IFS's assets was $ 67.5 million, which was based on the percentage of outstanding shares that IFS had actually pledged to GCM. These IFS assets included approximately $ 19 million in cash in October 1999. Schwartz testified that on October 31, 1999, IFS and Interamericas "had sufficient moneys and would have had sufficient moneys to pay the debt to GCM."

6 Schwartz testified as follows:

[Attorney]: What we put in front of the jury with respect to March is your expert opinion as to what could have been acquired, foreclosed?

[Schwartz]: Had GCM - -

[Attorney]: If GCM had exercised its right to foreclose, this is the amount of money you would have expected to recover from the assets?

[Schwartz]: Yes.

[Attorney]: And the same is true for October. If they had seized the assets in October?

[Schwartz]: Yes.

On December 31, 1999, IFS had a net value of $ 143 million, as shown in Grant's audit, and one month later, on January 31, 2000, IFS had a fair market value of [*19] $ 118 million, as shown in Deloitte's valuation. During the period of time between late 1999 and early 2000, significant assets valued between $ 90 and $ 150 million were depleted from IFS and placed into mostly offshore accounts, with no return in assets to IFS, according to Schwartz. Schwartz testified that, in his review of documents and information provided by GCM's attorneys and Hollander, he "saw evidence of assets moving out and not coming back in the system" beginning in late 1999 and early 2000. [7]

7 Schwartz gave examples of how the money was transferred out of IFS. Schwartz stated that IFS invested $ 24 million in a start-up company called Pueblo, by the spring of 2000, a lot of loans were made to a company called UNI, that $ 3 million was loaned to a company called Larce in February 2000, $ 13 million was loaned to a company called Southsea before March 2000, $ 4.5 million was loaned to a company called Northsea before March 2000, and the $ 44 million management fee was paid sometime in late 1999 or early 2000. Schwartz also testified that additional transfers were made after March 2000, although he did not identify specific transactions.

By the time of the March 2000 settlement [*20] and agreement to restructure the $ 74 million debt, Schwartz said that IFS had $ 29.9 million in "assets

available." Schwartz arrived at the $ 29.9 million figure by deducting costs for collecting on the debt from the larger amount of $ 34 million in available assets. Of the $ 29.9 million in net assets, Schwartz said that only $ 13.3 million in assets would have been available if GCM had recovered "nothing but the value of the shares actually pledged." Schwartz reached the figure of $ 13.3 million by apparently accounting for the amount that would have been necessary to redeem the outstanding shares of preferred stock.

Because of the significant depletion of IFS assets, Schwartz acknowledged that by March 2000, "there was no way GCM was going to get all its money." Schwartz explained that by March 2000, GCM was in a "work-out situation," which he described as follows:

In a credit arrangement borrower/lender, when the loan, the operations of the business, begin to deteriorate and the loan performance, the ability to come to service the loan comes into question, you often find that the bank or lender will put the loan in work-out where they're trying to maximize the recovery and figure [*21] out a strategy that will get them repaid, because [sic] on other than the agreed terms, because the agreed terms, the loan's not going to repay. Any number of factors, the work-out can take out any number of different ways, debt for dividends, interest for bearers, renegotiation.

Schwartz acknowledged that in a work-out situation, "lenders frequently agree to things that they would not normally agree to in order to try to preserve some value" because "the lender is just trying to make the best of a bad situation." Schwartz agreed that "the lender may believe that over the long run

they can recover more by restructuring than by incurring the cost of foreclosure and liquidation."

Schwartz related that IFS was no longer in operation as of March 2000 and the only source of payment that GCM would have had was through the sale of the assets of IFS. [8] Schwartz explained that "when you are looking at essentially the assets to pay off the debt, the value of those assets and their retention of value becomes critical to your recovery." Schwartz testified that he was determining the "value of the assets available to pay the debt or at least pay some on the debt." Schwartz said he was "looking at [*22] just generally the availability of assets to pay the debt." Schwartz acknowledged that he was not offering an opinion on what GCM might have realized by foreclosing on the shares and attempting to liquidate IFS's assets, but only that there was value in IFS. [9]

8 On rehearing, GCM asserts that this Court erred in its original opinion by stating that "IFS was no longer in operation as of March 2000 and the only source of payment that GCM would have had was through the sale of the assets of IFS." Specifically, GCM contends that this Court did not indulge every reasonable inference in its favor, as required by the standard of review, because the Deloitte valuation as of June 30, 2000, was made "under the premise of value as a going concern business enterprise with continuing operations," and because Hollander testified that IFS was "partially liquid" in March 2000.

GCM attempted to prove damages through Schwartz. The damages claimed by Schwartz were premised on his assessment that IFS was no longer in operation. Hollander's testimony that IFS was partially liquid, therefore, is not pertinent to the tes-

timony by Schwartz, whose opinion concerning damages was premised on the assessment that [*23] IFS was no longer in operation. We also note that although GCM now attempts to claim that Deloitte's June 30, 2000 valuation was premised on the continued operations of IFS, this is a newly asserted theory in this rehearing that is contrary to the theory asserted at trial. In its petition at trial, GCM asserted that "the transfer of the last hard operating asset and cash of IFS" occurred in May 2000.

9 Schwartz testified about his calculations as follows:

[Attorney]: . . . .The damage calculations that you've put before the Court and the jury today, those are hypothetical numbers with respect to what might have been recovered, aren't they?

[Schwartz]: I'm sorry, which ones are we talking about?

[Attorney]: The ones in October, either one of the ones in October?

[Schwartz]: Hypothetical, what we are trying to do is get an estimate that there appeared to be sufficient assets to pay the debt in October. That's what that does for me.

[Attorney]: But you're not offering any opinion that any of those assets could or couldn't have actually been realized upon, are you?

[Schwartz]: Well, we know that some of them are realized upon. We know they've raised $ 80 or $ 90 million from the sale of two subsidiaries [*24] between October and January. There's information that there's value there. I mean, I'm not opining that that is the number that would have been realized.

Schwartz also testified,

[Attorney]: I understand. But your objective is the same, right, to estimate the amount of or the value of assets available to pay the debt as of that point in time?

[Schwartz]: The value of the assets available to pay the debt or at least pay some on the debt.

D. Analysis

GCM asserts that it has produced some evidence of damages because (1) it would have become the majority shareholder if it had foreclosed on IFS's stock; (2) IFS had assets available to satisfy some or all of the debt; and (3) Schwartz took the costs of collection of the debt into account when he gave his figures on the available amounts.

1. Majority Stockholder

GCM asserts that had it foreclosed on IFS's stock in October 1999 or March 2000, it would have become the majority stockholder of IFS and would have recovered not only the value of the stock, but it also could have liquidated IFS's assets to recover the debt owed. Schwartz, however, did not offer an opinion on the value of the collateral, the shares of IFS. Schwartz stated that he was not [*25] offering an opinion "as to the value of the IFS common stock as to any point in time." Thus, there is no evidence of the value of the collateral--the shares of stock of IFS--in either October 1999 or March 2000.

GCM contends that regardless of the value of IFS's stock, foreclosure on the collateral would make GCM the majority shareholder of IFS, and GCM could have then liquidated the assets of IFS to satisfy the debt. But even assuming that foreclosure proceedings would have enabled GCM to become the

majority stockholder in IFS, GCM produced no evidence to show, in reasonable probability, that if it had succeeded at liquidating the assets, what the value of those assets would have been had the liquidation occurred. Schwartz did not testify to what GCM would have realized by foreclosing and liquidating IFS's assets, but only that there was some value in IFS in October 1999 or March 2000, when foreclosure proceedings could have been initiated. GCM, thus, offered no evidence showing that a foreclosure initiated in late October 1999 or in March 2000 would have resulted in the recovery of any of the indebtedness.

No direct evidence shows that foreclosure proceedings would have resulted in [*26] GCM's capturing any of IFS's available assets, and the record does not support any such inference. To the contrary, the only reasonable inference from the record is that assets could not have been reached through foreclosure proceedings beginning in October 1999 or March 2000. In October 1999, GCM was in litigation with IFS and Interamericas, and there was an injunction in place preventing GCM from accelerating or foreclosing on the debt. To begin foreclosure in October 1999, GCM would have had to first convince the court to lift the injunction to allow the foreclosure proceedings that were prohibited. [10] Even assuming that GCM could have convinced the court to lift the injunction to allow the foreclosure to proceed, no evidence shows, in reasonable probability, what would have been the result of foreclosure proceedings.

10 On rehearing, GCM asserts that this Court engaged in "an incomplete analysis of the evidence" regarding the injunction that was in place in October of

1999. In its entirety, GCM's motion for rehearing on this point states:

The Panel states that "GCM would have had to first convince the court to lift the injunction to allow foreclosure proceedings." This is not so [*27] much an error as it is an incomplete analysis of the evidence. The federal court had already required IFS to make a $ 21 million deposit in the registry of the court by November 1, 1999, as a condition of keeping the injunction. By the time of the October 1999 restructure, IFS had not made the deposit, but instead renegotiated. The logical inference is that the TRO could have been easily vacated if the deposit were not made.

The only evidence that GCM identifies in its motion for rehearing is evidence that the November 1, 1999, deadline existed and that the case was settled on October 27, 1999, by the October debt restructure. GCM asks that we assume that IFS would not have made the required $ 21 million deposit into the registry of the court by November 1, 1999, and that we therefore must assume that the court would have lifted the injunction. We cannot make those assumptions, however, because the undisputed evidence is that IFS paid $ 20 million to GCM in the weeks following the October 1999 restructure. No evidence supports making those assumptions.

The direct evidence from GCM's advisory committee member Hollander also suggests that it would not be reasonable to infer that foreclosure [*28] could have actually resulted in the acquisition of IFS's assets. Hollander testified that one of the reasons that he restructured in October 1999 instead of foreclosing was that the types of default that existed, namely the non-compliance with the book value ratio and

IFS's delinquency in producing monthly unaudited financial statements, were not the types of defaults that would cause a court to turn over control of IFS by foreclosing on the majority of outstanding shares of stock. Although knowledge of the $ 44 million restatement would have given GCM, in Hollander's words, "more ammunition to fight for a foreclosure," no evidence shows that the information would have resulted in a reasonable probability that GCM could have foreclosed on IFS's collateral. We cannot conclude that the evidence reasonably supports an inference that foreclosure proceedings initiated by GCM in October 1999 could have resulted in GCM's ability to capture any amount of IFS's assets.

By March 2000, IFS's assets were significantly depleted, and no evidence shows in reasonable probability what the result of foreclosure proceedings started in March 2000 would have been. As noted by Deloitte,

The relevant issue [*29] was not the value of IFS's realizable assets on March 31, 2000, a mere nine days after Deloitte's first valuation was delivered, but rather the value of realizable assets on March 21, 2000 following the conclusion of any foreclosure proceedings that GCM might have instituted and the conversion of its resulting stock ownership into possession of liquid assets. That date, almost certainly, would have been months after March 31, 2000. GCM's argument that Deloitte's second valuation concluded that the fair market value of IFS was $ 118 million as of January 31, 2000, is irrelevant. Given the rapidity with which IFS was disposing of assets in early 2000, the company's value on January 31, 2000, indicated very little about its value on March 31, 2000, and even less on some unknown fu-

ture date when GCM's hypothetical foreclosure proceedings would have been concluded.

To support their contention that it is not reasonable to infer that damages resulted from the decision not to foreclose, Deloitte and Grant note the events of June 2000, when Blitz attempted to foreclose on IFS's debt. When Blitz took over the debt of IFS from GCM in May 2000, Blitz attempted to foreclose on IFS's debt. On June [*30] 30, 2000, Blitz initiated an arbitration procedure seeking foreclosure and filed a federal lawsuit, obtaining a temporary restraining order forbidding IFS from transferring assets. Despite the initiation of foreclosure proceedings by Blitz and the restraining order against IFS, IFS's primary shareholder Pimienta transferred almost $ 62 million in assets out of IFS, according to Hollander. Hollander, however, continued to negotiate with IFS during the pendency of the arbitration and the lawsuit. Blitz finally obtained a judgment against IFS in April 2001, but by that time, the judgment was uncollectible. Here, there is simply no evidence that a foreclosure would have been any more successful at recovering any of the IFS debt than the restructure of the debt.

2. Assets Available

There is evidence that IFS had recoverable assets available in October 1999 and March 2000. The record is silent, however, on whether, in reasonable probability, any of the available assets could have been recovered had GCM decided to initiate foreclosure proceedings on IFS's debt in either October 1999 or March 2000, rather than restructure the debt. As discussed more fully above, the collateral for IFS's indebtedness [*31] was stock in IFS, not in the un-

derlying assets, and no evidence connects foreclosure on those shares with an ability to collect any amount of assets that was available in October 1999 or March 2000. We conclude that the mere fact that IFS had assets available in October 1999 or March 2000 does not establish that in reasonable probability any amount of those assets could have been actually recovered by foreclosure proceedings initiated on those dates.

3. Cost of Foreclosure

GCM asserts that Schwartz testified about the costs of foreclosure, discounts to be applied to any assets, and the "steps that Plaintiffs were required to take in order to foreclose." Schwartz did not testify about the necessary steps for foreclosure on assets or the reasonable probability of GCM's ability to collect any amount through the foreclosure proceedings. Although Schwartz estimated the costs of collection for a foreclosure in March 2000, [11] he did not describe how any amount of the assets could have been obtained by foreclosure proceedings that began in October 1999 or March 2000. Although Schwarz testified that he deducted the costs of foreclosure from the available amount of assets, his testimony constitutes [*32] no evidence of the actual damages incurred by GCM as a result of not foreclosing in October 1999 or March 2000.

11 Schwartz merely reduced the value of the assets that he said were available from approximately $ 34 million to $ 29.9 million. He did not explain why he chose that amount. Schwartz did not offer any testimony on the amount for costs of foreclosure in October 1999.

4. The Deloitte Valuations and Grant Audits

In its reply brief and in its motion for rehearing, GCM contends that the Grant audits and the Deloitte valuations are some evidence of the value of IFS. Specifically, GCM asserts,

Clearly, the audit report and the appraisals present much more than a scintilla of evidence of the value of the IFS shares, they provide direct evidence of the ability of GCM to recover damages, enough so to shift the burden to Appellees to come forward with evidence to the contrary. The anomaly of Appellees' position is obvious. They claim the values in their audit reports and appraisals are correct, yet deny any value in IFS when the damages are presented. Texas courts have long recognized that a party can be equitably estopped from taking inconsistent positions in judicial proceedings. . . [*33] . Allowing them to obtain a verdict in their favor based on their claim that the valuations were correct, while allowing them to argue that IFS had no value from which to collect GCM's debt would be an injustice.

Deloitte, in part, responds that it is GCM that cannot "argue that the valuations accurately reflect some minimum value of IFS, to which GCM would have been automatically entitled" because GCM claimed that the valuations were "inflated and unreliable."

"'Assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.'" *Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 568 (Tex. 2001)* (quoting *Houston First Am. Sav. v. Musick, 650 S.W.2d 764, 767 (Tex. 1983)*). "A judicial admission that is clear and unequivocal has conclusive effect

and bars the admitting party from later disputing the admitted fact." *Id.* (citing *Gevinson v. Manhattan Constr. Co., 449 S.W.2d 458, 467 (Tex. 1969)).*

In its live pleading before the trial court, GCM alleged the following facts regarding the Grant audits:

. the audits contained a "combination of nondisclosure of expenses and overstatement of assets [that] created a *grossly* [*34] *misleading* picture of IFS' financial condition" during the relevant periods;

. Grant negligently failed "to determine that IFS's financial statements did not fairly present IFS' financial condition in all respects";

. Grant concealed "IFS's true financial status from [GCM], as well as the relevant state and federal authorities";

. Grant negligently failed "to disclose that IFS's 1998 and 1999 financial statements contained *material misstatements* and *grossly misstated* IFS' financial condition";

. Grant negligently "overvalu[ed]assets" of IFS; and

. Grant committed common law fraud by failing to disclose that its earlier opinion--that IFS's financial statements "presented the financial condition of IFS fairly in all material respects"--was in fact false.

(Emphasis added).

GCM alleged the following concerning the Deloitte valuations:

. they "were seriously flawed";

. they "contained *gross errors* and negligent misrepresentations";

. Deloitte negligently "failed to determine in its valuations that the stocks and receivables were

worthless or worth millions of dollars less than represented by IFS";

. Deloitte negligently "overvalued IFS *by millions of dollars*" in the first valuation and this carried [*35] over into subsequent valuations;

. Deloitte caused GCM's damages because the "flawed valuations" prevented GCM from being able to convince a court that its debt was under-collateralized;

. Deloitte's valuations were a "*massive overvaluation* of IFS";

. the valuations contained "faulty, misrepresented information" and "errors in the valuations";

. Deloitte assisted Pimienta in making "false misrepresentations and omissions of facts regarding the value of IFS";

. Deloitte's valuations contained "mistakes in the valuations regarding the total assets in the report"; and

. Deloitte, acting fraudulently with Pimienta, made "material misrepresentations to [GCM] concerning the amount and status of the collateral that secured IFS's debt."

(Emphasis added).

These allegations of Grant's and Deloitte's alleged wrongs were not made in the alternative. Further, the inaccuracy of the audits and valuations forms the basis of GCM's theory of liability. If they are not inaccurate, GCM could not have been harmed by relying on them--as it alleges in its petition. Finally, in arguing the directed verdict before the trial court, GCM did not assert that the audits and valuations were accurate enough to provide an [*36] estimate of GCM's value.

Here, as a basis for liability, GCM made assertions of fact that were not pleaded in the alternative and that were clear and unequivocal. *See Holy Cross, 44 S.W.3d at 568.* Accordingly, these assertions are judicial admissions that are binding upon GCM, the party making them. *See id.* Therefore, the audits and valuations do not provide some evidence of what GCM could have recovered in a foreclosure in either October 1999 or March 2000--the theory of damages alleged by GCM. [12], [13]

12 GCM also appears to contend that, because it did not allege the third Deloitte valuation as a basis for liability, the third valuation provides some evidence of IFS's worth and is close in time to the March foreclosure. First, as detailed above, GCM alleged that all of the Deloitte valuations were "seriously flawed" and "contained gross errors." Further, GCM repeatedly explains that the third valuation shows the same value as the second, only changing because the assumption of Interamericas's debt via the March restructuring appears for the first time on the third valuation. That is, the second valuation shows a value of $ 118,800,000. After subtracting the $ 70,000,00 indebtedness, [*37] IFS's value is $ 48,800,000--the amount shown in the third valuation.

13 GCM cites to *Smith v. Chipley, 118 Tex. 415, 16 S.W.2d 269 (Tex. 1929).* GCM quotes the following passages to support its argument: "To permit a party to . . . [make] a representation as to a given state of facts, and thus obtain an advantage over his adversary . . . and then . . . assert . . . the very matter disclaimed . . . would be contrary to every principle of right, and will not be tolerated." *Id. at 276.* However,

the ellipses in the quote leave out important facts that show *Smith* is distinguishable from this case. As the supreme court phrased the issue in that case:

> We are therefore confronted with this one question: Can Mrs. Chipley invoke the jurisdiction of the Supreme Court to grant her relief, basing her grounds for relief on the plain and direct statement that the partnership had been wound up, and that she had and claimed no interest in the profits, and was not liable for any losses arising out of the sale of the west one-half of said land, that there were no losses or liabilities to be settled, that same had already been settled, that Smith was entitled to all the profits, and liable for all the losses on said west [*38] half; and many other statements of the same nature, and thus rightfully or wrongfully, it being immaterial which, obtain a judgment in her favor in the Supreme Court, and then later institute and maintain another suit against the very same party on the very claim that she disclaimed any interest in the first suit? We think that to state the question is to answer it.

Id. at 275--76. Here, neither Grant nor Deloitte have made representations to a court to secure a judgment in its favor and then--in a subsequent proceeding--asserted a claim inconsistent with those representations. Thus, *Smith* is not controlling in this case.

5. The Loan Documents

In its reply to Grant's and Deloitte's response to its motion for rehearing, GCM contends that this Court erred in its original opinion in this case by discussing the "perceived difficulties in foreclosing on the IFS assets" because of the "ease with which fore-

closure occurs under the loan documents." [14] Specifically, GCM asserts that the loan documents provided that Chase Bank was the custodian of the collateral--the shares of IFS. GCM then asserts that "[i]n the event of default" Chase Bank would turn over the shares at GCM's demand. [15] GCM could [*39] then hold an emergency shareholders' meeting and elect new officers and directors for IFS "strip[ping] Pimienta of any authority to act for IFS." This, contends GCM, would have prevented Pimienta from transferring any assets and given GCM the ability to dispose of the assets. [16] GCM finally asserts that the ease of foreclosure was further shown because "[i]f IFS chose to contest the turnover, it was required to do so in fast moving arbitration."

14 GCM cites to no authorities to support this point in its motion for rehearing.

15 Despite the defaults that existed and of which GCM was aware, GCM never made this demand.

16 To support these assertions in its rehearing, GCM cites generally to the Security Agreement, Agreement Concerning Collateral, the Basic Agreement, and the Credit Agreement, without specifying any particular section. However, the section that sets forth the remedies in the event of default (in the Security Agreement) provides a procedure for GCM to sell the collateral--not a procedure for Chase Bank to turn the shares over to GCM. The Security Agreement does provide that GCM would have the voting rights of the shares during an "event of default," but that section acknowledges [*40] that IFS or Pimienta would have to "give consents, ratifications and waivers" to give these votes "the same force and effect as if [GCM] were the owner" of the shares.

GCM also contends that the events "that took place after the CLA restructure in May 2000 . . . have little relevance to events that could have taken place in October 1999 or March 2000, because after May 2000, the parties were operating under entirely new loan documents, and because the passage of time had allowed Pimienta to move assets out of reach."

Grant responds that in October of 1999, when GCM claims that it relied upon Grant's audit to its detriment, there was still an injunction in place preventing GCM from foreclosing. Grant further points out that, under the Uniform Commercial Code (UCC), merely taking possession of the collateral (the shares of IFS) was not enough for GCM to become the holder of the shares and thus able to vote on them and take control of IFS. Rather, the requirements of the UCC would have to be met, and there was no evidence regarding these necessary steps. [17] Finally, in a point that Deloitte also makes, Grant asserts that looking to the actual foreclosure that Blitz initiated in June of [*41] 2000 is appropriate because Hollander testified that each restructuring put GCM and Blitz in a better position regarding its indebtedness.

17 For example, UCC section *9.620* provides a number of requirements for a secured party to accept collateral in satisfaction of the debt, rather than conducting a foreclosure sale. *See TEX. BUS. & COM. CODE ANN. § 9.620* (Vernon 2002).

First, throughout its brief and motion for rehearing, GCM speaks of foreclosing on the assets of IFS. However, the collateral for the loans were shares of IFS--not the assets. GCM presented no evidence of the value of those shares. [18] Thus, even if GCM was

able easily to take possession of the shares, under its theory of damages, it still would have to contend with Pimienta, [19] convert possession of the shares into control of IFS, and then take control of and liquidate IFS's assets. However, Schwartz only testified that IFS had assets with some value from which GCM could have recovered.

18 GCM identifies the following testimony from Marc Schwartz, the account who served as GCM's damages expert, as some evidence of raising at least a fact issue with respect to the value of the shares and, thus, the amount of damages:

[Attorney]: [*42] Just by way of summing up. In your analysis, if in October you recover nothing but the value of the shares pledged, the shares that were in GCM's hands, you get $ 67,500,000, correct?

[Schwartz]: Correct.

[Attorney]: The most conservative possible number?

[Schwartz]: Yes.

[Attorney]: And with respect to the most conservative possible number as to March, it's 13,284000?

[Schwartz]: Correct.

First, as detailed in the opinion, Schwartz clearly states that he is not giving an opinion on the value of the shares (or what GCM might have recovered), only that IFS had some assets available from which GCM might recover. Further, from the phrasing of the questions and the overall context of Schwartz's testimony, GCM has not accurately interpreted the above exchange. Schwartz's damages model relied on the percentage of all the IFS stock pledged to secure the debt, as well as all other stock held by In-

teramericas and Pimienta. Schwartz performed two damages calculations for both October 1999 and March 2000--one for the higher percentage of shares and one for the lower. Schwartz identified a value of IFS's underlying assets and then multiplied this number by the two percentages of shares.

Thus, the testimony [*43] above--when taken in context of Schwartz's damages model and the rest of his testimony--clearly refers only to the lower percentage of stock, not to some estimate of the actual value of the shares.

19 GCM presented evidence that Pimienta would, and, in fact, did, fight to delay or prevent every action that GCM took to foreclose or collect on its loans.

GCM's assertion that we should not consider the events surrounding the eventual foreclosure in June 2000 is inconsistent with the evidence it presented at trial. Hollander testified that the restructuring gave Blitz more favorable terms and conditions than GCM had previously. Thus, the only reasonable inference is that an earlier foreclosure would have been more difficult than the one that actually took place.

6. Conclusion

GCM stated its theory of damages to the trial court as follows:

We are trying to collect the money that GCM would have had if it had chosen to foreclose in October, or it had later chose[n] to foreclose in March. That is what we are trying to recover.

GCM, however, did not present any evidence to provide the trier of fact a reasonable basis for determining the amount of money that it would have recovered had it sought foreclosure [*44] in October 1999 or March 2000. It is undisputed that when Blitz

attempted to foreclose on the debt in June 2000, IFS actually transferred its assets to other entities in violation of the court order and then declared bankruptcy, making the debt uncollectible. GCM failed to produce any evidence that foreclosure proceedings initiated three months earlier in March 2000 or nine months earlier in October 1999 would have enabled it to acquire any assets of IFS. Even if GCM had opted to foreclose and began foreclosure proceedings on the collateral of IFS, there is no evidence in the record that any such foreclosure would have actually resulted in GCM's ability to take possession of the majority stock of IFS, or the value of that stock. Furthermore, even if GCM had taken possession of the stock to become the majority shareholder, there is no evidence that any assets would have been reached through liquidation of the IFS assets when that would have occurred at some time following the foreclosure proceedings. *See Sunshine Mining and Refining Co., 114 S.W.3d at 52* (holding that there was no causal link between auditor's actions and company's damages because "there must be some evidence that the [*45] spring stock offering would have been successful in order for [the company] to establish the causal link for the damages it seeks"); *Keo, 76 S.W.3d at 731.*

Thus, GCM presented no evidence of any damages resulting from its decisions in October 1999 and March 2000 to restructure IFS's debt. GCM presented no basis for a jury to determine, with reasonable certainty, the amount of "money that GCM would have had if it had chosen to foreclose." *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 50 (Tex. 1998)* (holding that there was no evidence that plaintiff would have obtained contract had its bid been lower);

Szczepanik v. First S. Trust Co., 883 S.W.2d 648, 650 (Tex. 1994) (holding that there was no evidence that plaintiff could have retained accounts for any period of time because account holders could transfer accounts at will); *Miller, 387 S.W.2d at 692* (holding that, because it was not certain creditor's effort to collect debt would have been successful, there was no evidence of damages). [20] GCM's expert on damages, Schwartz, acknowledged that he was not offering an opinion on what GCM might have realized by foreclosing on the shares and attempting [*46] to liquidate IFS's assets, only that there was some value from which GCM could recover some part of its debt. Accordingly, we hold that the trial court did not err by granting a directed verdict in favor of Grant and Deloitte on the ground that GCM presented no evidence of damages. *See City of Keller, 168 S.W.3d at 813* (noting that evidence is not legally sufficient "if jurors would have to guess whether a vital fact exists").

20 On rehearing, GCM criticizes this Court's reliance on *Miller v. Bank of Commerce, 387 S.W.2d 691 (Tex. Civ. App.--Fort Worth 1965, no writ)*. Specifically, GCM points out that the authorities relied upon by the court in *Miller*--a section of *Corpus Juris Secundum and Evans v. Burson, 1917 OK 118, 65 Okla. 114, 164 P. 471 (1917)*--both refer to an unsecured creditor--not a secured creditor like GCM. GCM contends that a case much more on point is *Ross v. W.D. Cleveland & Sons, 133 S.W. 315 (Tex. Civ. App.--Houston [1st Dist.] 1910, no writ)*. GCM explains that, in *Ross*, the creditors were granted a security interest in collateral to secure a debt, but "refrained from collecting the debt, based on fraudu-

lent misrepresentations from Defendant, until the collateral was wasted and the debtor [*47] was insolvent.".

First, the court in *Miller* nowhere expressly states that its holding applies only to secured creditors. Further, GCM does not contend that the general rules that a plaintiff is required to produce some evidence from which the jury could reasonably determine its loss and that speculative damages are not recoverable do not apply in this case.

In *Ross*, the court affirmed a jury verdict for the plaintiff, who was a secured creditor of the debtor. *Ross, 133 S.W. at 317.* The defendant, who was also a secured creditor of the debtor, had the collateral in his possession. *Id.* The defendant "negligently failed to exercise ordinary care to preserve, utilize, and appropriate the proceeds" of the collateral. *Id.* The plaintiffs sued the defendant, not for misrepresentations about the collateral, but for the negligent wasting of the collateral. *Id.* Here, the allegations against Grant and Deloitte are based on misrepresentations--not on their having negligently wasted the collateral. Thus, *Ross* is distinguishable.

In support of its arguments, GCM relies on *Vance* and *Field*, but both cases are factually distinguishable. In those cases, the evidence established *some* amount for the damages, [*48] but here no evidence and no reasonable inference from the evidence shows any amount of damages caused by GCM's decision not to foreclose. *See Vance, 677 S.W.2d at 484* (holding that directed verdict was improper on element of damages because some evidence showed reasonable basis for determining party's loss, even though exact amount of damages could not be ascertained and there was substantial conflict in evidence with re-

gard to exact cost of repairs); *Field, 845 S.W.2d at 472* (holding that directed verdict was improper on element of damages because plaintiff recited amount for which stock could have been sold, stockbroker testified regarding probable value of stock, and AIM executive related how much was eventually paid for plaintiff's AIM stock). On rehearing GCM again cites these cases, explaining them in the following parenthetical: "holding a directed verdict is improper if the plaintiff produces some evidence of a reasonable basis for determining his loss, even if the exact amount is not ascertainable or contradicted by other evidence." This is correct. A party seeking damages must present *some evidence of a reasonable basis for determining his loss.* The proof of damages fails [*49] here because no evidence shows a reasonable basis for determining the loss to GCM.

On rehearing, GCM also asserts that there is no Texas case "directly on point on how to calculate damages when one is wrongfully prevented from foreclosing," but that "[c]ourts in other states have had no problem upholding damages." The lone authority that GCM identifies is *Brown v. Critchfield.* [21] *100 Cal. App. 3d 858, 161 Cal. Rptr. 342 (Cal. Ct. App. 1980).* In *Brown,* the plaintiff sued his former attorney and real estate agent alleging that their fraud, negligence, or breach of fiduciary duties had damaged him. *Id. at 344.* Plaintiff had sold real property and retained a deed of trust to secure the purchaser's indebtedness. *Id. at 345.* Plaintiff released 15.56 acres to the purchasers that they later sold for $ 335,000. *Id.* Plaintiff brought suit against his real estate agent and attorney, alleging that because of their failure to inform him that the purchasers were in default at the time he released the 15.56 acres, he was damaged by that erroneous advice. *Id.*

at 344. Plaintiff alleged that he was damaged in the amount that the purchasers received--$ 335,000. *Id. at 351.* The trial court granted summary judgment for defendants [*50] on the grounds that the damages alleged by plaintiff were not recoverable as a matter of law and plaintiff had therefore failed to state a cause of action. *Id. at 344.*

21 GCM did not raise this case before the trial court or in its original brief to this Court.

The California court of appeals noted that plaintiff's alleged measure of damages was wrong. *Id. at 351.* However, the court stated the general rule that "[u]ncertainty as to the fact of damage, that is, as to its nature, existence or cause of the damage, is fatal" to a plaintiff's cause of action. *Id. at 350.* The court also stated that "recovery will not be denied because the damages are difficult of ascertainment." *Id. at 351.* The court, after analyzing the California anti-deficiency legislation and concluding that it did not bar plaintiff's damages, noted that there were three alternatives showing how plaintiff was damaged by the erroneous advice of his agent and attorney. [22] *Id. at 350-51.* The court noted that it did not matter which of these was correct, because the plaintiff had adequately alleged the fact of damages. *Id. at 351.* The court of appeals therefore reversed the summary judgment. *Id.*

22 Because of the erroneous [*51] advice "plaintiff was damaged for the following reasons:

(1) If the purchasers had cured the default, plaintiff would not now be liable for the delinquent taxes, penalties and redemption fees.

(2) If plaintiff had foreclosed and entered a full credit bid, he would now have the property or its equivalent value in money, and would not now be liable for tax penalties and redemption fees.

(3) If another bidder had obtained the property, plaintiff would have recovered foreclosure costs and would not now be liable for the delinquent taxes, penalties and redemption fees."

Brown v. Critchfield, 100 Cal. App. 3d 858, 161 Cal. Rptr. 342, 351 (Cal. Ct. App. 1980).

Brown is distinguishable from this case. First, it involved a summary judgment as a matter of law on the adequacy of the pleadings, not a motion for directed verdict due to no evidence of damages. As the California court stated in the opinion, "The sole issue on appeal is whether plaintiff has alleged damages sufficient to support his causes of action for fraud and negligence." *Id. at 345.* Further, based on the statement in *Brown,* it appears that the general rule in California is in accord with Texas law--that uncertainty as to the fact of damages is fatal to [*52] recovery, but the fact that damages are incapable of precise calculation is not. *Compare id. at 350-51 with McKnight, 689 S.W.2d at 207.* The plaintiff in *Brown* adequately alleged that the wrongful act of defendants caused him some damages. *Brown, 161 Cal. Rptr. at 350.* Here, our analysis of the law and the evidence leads us to the conclusion that GCM did not present any evidence from which a trier of fact could determine with reasonable certainty the amount of damages caused by Grant's and Deloitte's alleged misconduct--an issue not addressed in *Brown.* We therefore conclude that *Brown* is not persuasive in this context.

We overrule GCM's third issue.

GCM's Texas Securities Act Claims

In its eleventh issue, GCM contends that the trial court erred by granting summary judgment for Deloitte on GCM's claims for violations of the Texas Securities Act because the Commercial Loan Agreement is a security.

"If summary judgment may have been rendered, properly or improperly, on a ground not challenged, the judgment must be affirmed." *Ellis v. Precision Engine Rebuilders, Inc., 68 S.W.3d 894, 898 (Tex. App.--Houston [1st Dist.] 2002, no pet.)*; *see also Jacobs v. Satterwhite, 65 S.W.3d 653, 655 (Tex. 2001)* [*53] (holding appellate court may not reverse judgment on grounds not raised and argued on appeal); *San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 209--10 (Tex. 1990)* (same). That the CLA was not a security is only one of the grounds that Deloitte asserted as a basis for its motion for summary judgment. GCM does not attack any other ground for summary judgment. We therefore affirm the summary judgment with respect to GCM's Texas Securities Act claims. *See Ellis, 68 S.W.3d at 898.*

On rehearing, GCM contends that the trial court did not grant summary judgment without specifying the grounds for it. GCM contends that the reporter's record shows that the trial court expressly only considered the point that it now attacks on appeal (that the Commercial Loan Agreement ("CLA") was not a "security") and no other.

A judge's oral comment at a hearing on a motion for summary judgment cannot be used to specify the ground upon which summary judgment was granted. *Richardson v. Johnson & Higgins of Tex., Inc., 905 S.W.2d 9, 11 (Tex. App.--Houston [1st Dist.] 1995,*

writ denied). "It is the court's order that counts, not the stated reason or oral qualifications." *Id.; see also Ajudani v. Walker, 177 S.W.3d 415, 417--18 n.3 (Tex. App.--Houston [1st Dist.] 2005, no pet.)* [*54] (following *Richardson*). Here, the trial court's order states,

> The Court, having considered [another party's motion] and the motion for summary judgment filed by Deloitte & Touche LLP ("Deloitte"), as well as any timely-filed response, hereby ORDERS as follows:
>
> The motions for summary judgement are granted in Part and all of Plaintiffs' causes of action against [the other party] and Deloitte asserted under the Texas Securities Act are hereby dismissed.

The trial court's order simply states that Deloitte's summary judgment on the Texas Securities Act claim was granted. The order does not specify any specific ground. Because the order itself did not specify the grounds, the trial court's oral comments at the hearing cannot be the basis for specifying a particular ground upon which summary judgment was granted. *See Ajudani, 177 S.W.3d at 417--18 n.3; Richardson, 905 S.W.2d at 11.* [23]

23 In its motion for rehearing, GCM also contends that Deloitte's other, unchallenged grounds for summary judgment were all derivative of and dependent upon Deloitte's contention that the Commercial Loan Agreement was not a Security. This is not the case. For example Deloitte's Supplemental Motion for Summary Judgment [*55] included as a ground that, even if the Commercial Loan agreement was a security, it was exempt from the registration requirements of the TSA.

We overrule GCM's eleventh issue.

Having overruled GCM's third and eleventh issues, we need not reach GCM's first, second, [24] and fourth through tenth [25] issues, nor Grant's two cross-points. [26]

24 In its second issue, GCM challenges the trial court's directed verdict on the lack of proof of damages due to undisputed evidence that GCM transferred the debt to Blitz and that Blitz fully satisfied the debt with a promissory note to GCM for the entire amount of the debt owed by IFS to GCM. We do not reach this alternative argument that there is no proof of damages due to the full satisfaction of the IFS debt by the promissory note given to GCM by Blitz. To the extent that Deloitte and Grant contend that GCM lacks standing due to the promissory note from Blitz, we reject that challenge because the pleadings by GCM alleged that the erroneous information provided by Grant and Deloitte caused GCM to restructure the debt rather than to foreclose on the notes and that, had it foreclosed, it would have recovered something more than a worthless promissory note. [*56] *See Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993)* (pleadings, viewed in favor of plaintiff, must allege facts that affirmatively demonstrate court's jurisdiction to hear case); *Cedar Crest Funeral Home, Inc. v. Lashley, 889 S.W.2d 325, 330 (Tex. App.--Dallas 1993, no writ)* (holding that pleadings that alleged injury from wrongful conduct showed plaintiffs had standing).

25 In its first issue, GCM challenges the directed verdict in favor of Grant and Deloitte by asserting that it produced more than a scintilla of evidence that it was unnecessary to produce the other members of the advisory committee to establish that they

would have voted to foreclose because Jorge Hollander and Malu McKee, through Gamma Capital Services, had the power to foreclose on IFS. In its fourth and fifth issues, which concern Grant only, GCM contends that it introduced more than a scintilla of evidence of Grant's fraud or negligence in failing to timely notify GCM of the 1999 change to the 1998 audit and that it could have foreclosed under other sections of the agreement, even if GCM had waived the "book value ratio." GCM's remaining issues, numbered six through 10, concern Deloitte [*57] only. GCM contends that it produced some evidence that Deloitte's business valuations were inaccurate and that Deloitte committed fraud and conspired to commit fraud with IFS. GCM also asserts that it did not impermissibly fracture its causes of action against Deloitte, that its claims against Deloitte are not barred by the statute of limitations, and that the evidence supports punitive damages.

26 In its two cross-points, Grant challenges the trial court's denial of a directed verdict on its negligent misrepresentation claim on the grounds that (1) a negligent misrepresentation claim requires that the representation be made to a known party for a known purpose and that GCM did not rely on Grant's audits for a known purpose, and (2) there was no duty to disclose information under the facts of this case.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala

Justice

App. C

Opinion issued May 8, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-04-00627-CV

BLITZ HOLDINGS CORPORATION AND GCM CORPORATION, LTD., Appellants

V.

GRANT THORNTON, LLP AND DELOITTE & TOUCHE, LLP, Appellees

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 2001-38158

MEMORANDUM OPINION ON REHEARING

We issued an opinion in this case on May 24, 2007. Appellants, GCM Corporation, Ltd. (GCM) Blitz

Holdings Corporation, moved for a rehearing. After receiving a response from appellees, Grant Thornton, LLP (Grant) and Deloitte & Touche, LLP (Deloitte), we granted rehearing, withdrew our opinion, vacated our judgment of May 24, 2007, and issued a new opinion on October 25, 2007. GCM and Blitz filed a second motion for rehearing and also filed a motion to recuse Justice Alcala, the author of the May 24, 2007 and October 25, 2007 opinions. Justice Alcala recused herself from this case. The remaining panel members grant rehearing,[1] withdraw the opinion of October 25, 2007, authored by Justice Alcala, vacate our judgment of October 25, 2007, and issue this opinion.

Appellants, GCM and Blitz,[2] appeal from a take-nothing judgment rendered in favor of Grant and Deloitte. This case concerns audit reports prepared by Grant and business valuations prepared by Deloitte, of corporations, IFS Financial Holdings Corporation (IFS) and Interamericas Financial Holdings Corporation (Interamericas), that were indebted to GCM. GCM contends that by relying on the erroneous information in these reports about the financial condition of IFS and Interamericas, GCM did not foreclose on the debt and instead restructured the debt, which caused GCM to ultimately lose $74 million when the debt was not paid after the restructure. The trial court granted a partial summary judgment in favor of Deloitte, and, at trial, directed verdicts in favor of Grant and Deloitte.

In its third issue, GCM challenges the trial court's directed verdict in favor of Grant and Deloitte on all of GCM's claims, asserting that GCM produced more than a scintilla of evidence to prove the damages that it would have recovered had it foreclosed on the debt

in either October 1999 or March 2000 instead of restructuring the debt. In its eleventh issue, GCM asserts that the trial court erred by rendering partial summary judgment in favor of Deloitte by determining that the 2000 IFS Note was not a security as a matter of law under the Texas Securities Act. *See* Tex. Rev. Civ. Stat. Ann. arts. 581-1 to 581-43 (Vernon 1964 & Supp. 2007). We affirm the judgment of the trial court.

Factual Background

GCM was a company in the business of assisting Mexican nationals to make investments in the United States. GCM took the funds that it received from these investors and loaned the money, an amount that totaled approximately $95 million in December 1998, to IFS and IFS's parent company, Interamericas. Of this total amount, IFS owed GCM $18.2 million pursuant to the terms of a "Basic Agreement," which was ultimately paid in full. The remaining loan by GCM was with Interamericas for a total of $76 million for five promissory notes pursuant to a "Credit Agreement."

Interamericas secured its indebtedness by an "Agreement Concerning Collateral" that provided that Interamericas pledged shares of stock in IFS, IFS pledged shares of stock in one of its subsidiaries, and Hugo Pimienta pledged 64% of the outstanding voting shares in IFS. Pimienta was the principal owner and investor of IFS, Interamericas, and related companies. The agreements specifically required the value of the collateral to meet what the parties refer to as the "market value ratio" and the "book value ratio."[3] Further, the agreements required that the market value of the shares be determined by Marshall & Stevens, Incorporated or

"by an appraisal firm selected by [GCM] and acceptable to [Interamericas]." The book value of the stock was to be determined "on the basis of IFS's audited financial statements prepared in accordance with [Generally Accepted Accounting Principles] as of the end of the immediately preceding fiscal year." The first payments for these debts were due October 31, 1999. Before the first payments were due, however, IFS and Interamericas filed suit and obtained a temporary restraining order preventing GCM from accelerating the debt or foreclosing on the collateral.

October 1999 Restructure that Relied on Grant's Audits for 1998

After the lawsuit was filed in 1999, GCM entered into settlement negotiations with IFS and Interamericas, which resulted in the October 1999 debt restructure. Under the debt restructure in October 1999, Interamericas and IFS agreed to pay GCM $2 million upon execution of the agreement, $18 million by December 3, 1999, and $12 million by January 31, 2000. Interamericas and IFS paid the first two payments that totaled $20 million, but missed the third payment of $12 million that was due January 31, 2000.

In deciding to enter into the October 1999 restructure of the indebtedness, GCM relied on Grant's audits of the financial statements of Interamericas and IFS for the year ending December 31, 1998, which showed that the required book value ratio was not met by Interamericas and IFS. Although GCM was aware that the 1998 audits showed that the book value ratio was not met, GCM opted not to foreclose based on the book value deficiency because it had waived the book value

ratio. Jorge Hollander, a member of GCM's advisory committee, testified that GCM waived the required book value ratio "since the beginning until April 2000." The failure of Interamericas and IFS to meet the book value ratio was known by GCM, and the deficiency was waived by GCM when the debt was restructured in October 1999.

After the October 1999 restructure of the debt, Grant again audited Interamericas and IFS for the year 1999. In this second audit, Grant discovered a $44 million "management fee" that was paid in December 1999 by IFS to a related entity. IFS asserted that the payment was for services that had been performed over several years. Based on the newly-reported management fee, Grant added a note to the 1999 audit statements that it was restating the 1998 book value at $119 million, instead of the value that was originally reported at $143 million. The audit statements also show that the December 1999 book value of IFS was just under $135 million. The management fee charge of $44 million was "made known" to Grant by February 21, 2000. Grant, however, did not inform GCM of the change in its audit for 1998 until June 2000.

March 2000 Restructure that Relied on Grant's Audits and Deloitte's Valuations

In early 2000, IFS hired Deloitte to perform a valuation of the market value of the pledged stock "in accordance with the terms of the Agreement Concerning Collateral." Deloitte's proposal to provide services to IFS expressly stated that Deloitte was entitled to rely on and would not independently verify information provided to it by IFS. Deloitte's

first valuation of IFS's stock was based on the value as of October 31, 1999.

GCM filed a lawsuit against Interamericas and IFS after they failed to pay the $12 million due January 31, 2000, and settlement negotiations ensued. During the settlement negotiations, GCM received information in March 2000 that the valuation by Deloitte was that IFS's stock was valued at around $153 million on October 31, 1999. Although GCM was aware that the value of IFS's stock on October 31, 1999, was below the required market value ratio, GCM did not pursue the default, opting instead to settle the dispute on March 21, 2000. The settlement provided that GCM would receive the $12 million payment and the debt would again be restructured.

The restructure involved the exchange of promissory notes on May 24, 2000. As part of the restructuring, Blitz, a Panamanian corporation, was formed for the sole purpose of holding IFS's debt. Under a "Commercial Loan Agreement" between Blitz and IFS, Blitz loaned $74 million to IFS for the specific purpose of IFS purchasing all of Interamericas's indebtedness to GCM. At the same time, GCM loaned Blitz $74 million. Under the terms of the agreement between Blitz and GCM, Blitz would pay GCM when IFS paid Blitz. Thus, as of May 24, 2000, Interamericas was no longer a party to any indebtedness; IFS owed $74 million to Blitz; and Blitz owed $74 million to GCM. The agreements and notes between GCM and Interamericas and IFS were no longer in effect.

Depletion of IFS's and Interamericas's Assets

In the months immediately preceding the March 2000 restructure that included the formation of Blitz, IFS and Interamericas depleted a significant amount

of assets. Mark Schwartz, an expert for GCM, testified that in late 1999 to early 2000, IFS moved significant amounts of money into other entities, mostly offshore entities, that never came back through loans or transfers. Because of the depletion of IFS's assets, by March 2000, according to GCM's expert, there was "no way" GCM was going to recover all of its money.

The Lawsuit by Blitz Against IFS

After the decision to restructure the debt was made in March 2000 by transferring IFS's debt to Blitz, Blitz sued IFS three months later, in June 2000, and obtained a temporary restraining order prohibiting IFS from transferring assets.[4] On April 17, 2001, a federal district court granted a judgment against IFS and in favor of Blitz for $95 million for the promissory note, plus interest and attorney's fees. Only $2 million has been collected on the judgment due to the declaration of bankruptcy by IFS in August 2002. The effect of Blitz's uncollectible judgment against IFS is that Blitz is relieved of the duty to pay the promissory note it has with GCM because the terms of the agreement between Blitz and GCM were that Blitz would pay GCM only when IFS paid Blitz. Thus, although GCM has, through written documents, received "full satisfaction" of the debt with IFS by virtue of a promissory note from Blitz, GCM contends that the promissory note is not collectible under the terms of its agreement with Blitz because the terms provide that Blitz is excused from payment on the note until it is paid by IFS and IFS is bankrupt and unable to pay. GCM thus asserts that it has suffered a monetary loss of millions of dollars, despite the existence of a

promissory note that outwardly appears to satisfy the debt.

GCM's Claims Against Grant and Deloitte

GCM brought suit against Grant and Deloitte, claiming that, if GCM had foreclosed on the debt instead of restructuring the debt, then it would have been able to recover at least some of the debt. Specifically, against Grant, GCM sought recovery for (1) "negligence/accounting malpractice," (2) common-law fraud, and (3) negligent misrepresentation. GCM also sought punitive damages for gross negligence or malice. There are two underlying bases of GCM's suit against Grant. First, GCM claims that Grant wrongfully failed to discover the $44 million management fee when it conducted the audit of the 1998 financial statements because, even though the fee was not paid until December 1999, Grant's audit should have discovered the fee that, according to IFS, had been accruing over several years before it was paid. GCM contends that had Grant discovered the $44 million management fee and properly stated IFS's value for 1998 at $119 million instead of $143 million, GCM would not have entered into the October 1999 restructure of the debt because GCM would have had "more ammunition to fight in court for a foreclosure." Second, GCM contends that, once Grant actually learned of the fee, it wrongfully failed to inform GCM of its discovery until June 2000, when it was too late to act on the information. According to GCM, had Grant informed GCM in February 2000 about the change in the December 1998 value of IFS, GCM would have sought foreclosure in March 2000, instead of restructuring the debt.

Against Deloitte, GCM sought recovery for (1) aiding and abetting violations of the Texas Securities Act,

(2) negligence, (3) negligent misrepresentation, (4) conspiracy to commit fraud, (5) breach of fiduciary duty to a known third party, and (6) breach of contract (as the third-party beneficiary to the contract). GCM also sought punitive damages for malice and attorney's fees under the Texas Securities Act and Texas Civil Practice and Remedies Code section 38.001. On appeal, GCM asserts that it also sued Deloitte for fraud.

In response to GCM's Texas Securities Act claims, Deloitte filed a motion for summary judgment on multiple grounds, including that the note was not a security as a matter of law, and the trial court granted the motion. The remaining claims were tried to a jury. Grant and Deloitte moved for a directed verdict, asserting that GCM had (1) failed to produce any evidence of damages because Blitz fully satisfied IFS's debt to GCM through a promissory note and therefore GCM had no standing to bring the suit; (2) failed to produce any evidence that a foreclosure in October 1999 or in March 2000 would have been successful in recovering any of the debt owed by IFS and Interamericas; and (3) failed to produce any evidence that GCM would have foreclosed earlier had it received all the information that it alleges it should have received. The trial court granted the direct verdict on these grounds, which pertain to every cause of action asserted by GCM.

Grant and Deloitte also made separate motions for directed verdict. Grant moved for a directed verdict on the ground that Grant's alleged wrongful acts did not cause GCM's harm because GCM had waived the book value ratio as a ground for default on the debt. Deloitte moved for a directed verdict on the grounds that (1) GCM's negligent misrepresentation claim

against Deloitte failed because there was no evidence that the valuation was "false" or that Deloitte made a misrepresentation for a known purpose, (2) there was no evidence that Deloitte conspired to commit fraud, (3) GCM had impermissibly "fractured" a claim for professional malpractice into multiple causes of action, (4) limitations barred claims against Deloitte, and (5) there was no evidence to support an award of punitive damages against Deloitte. The trial court granted both motions.

Directed Verdict on Damages

In its third issue, GCM contends that the trial court erred by granting the directed verdict against it on the element of damages, which it claims were proven through its expert Schwartz.[5] The trial court granted the directed verdict on the ground that GCM failed to produce any evidence that a foreclosure on IFS's assets would have resulted in recovery of any of the debt owed by IFS and Interamericas to GCM.[6] Grant and Deloitte assert that the evidence fails to show any damages caused to GCM by restructuring the debt instead of foreclosing on the debt. The parties do not dispute that IFS had assets in October 1999 and March 2000 that could have been used to satisfy at least some of the outstanding indebtedness to GCM. Thus, the dispute is whether any evidence shows that, assuming GCM had foreclosed instead of restructuring the debt in either October 1999 or March 2000, the initiation of foreclosure proceedings against IFS by GCM in either October 1999 or March 2000 would have, in reasonable probability, been successful in recovering any of IFS's assets while they were still available.

In regard to Grant, GCM contends that, based on Grant's erroneous information about IFS's 1998 book

value, it suffered damages resulting from GCM's decision to restructure rather than foreclose in October 1999 and March 2000. In regard to Deloitte, GCM contends that, based on Deloitte's erroneous information about the 1999 market value of IFS, it suffered damages resulting from GCM's decision to restructure rather than foreclose in March 2000.

A. Directed Verdict Standard of Review

A directed verdict in favor of a defendant is proper when the plaintiff does not present evidence that raises a fact issue essential to the plaintiff's right of recovery, or when the plaintiff admits or the evidence conclusively establishes a defense to the plaintiff's cause of action. *Prudential Ins. Co. v. Fin. Rev. Servs. Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). In reviewing a directed verdict, the standards are the same as a legal sufficiency challenge. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We "[c]redit[] all favorable evidence that reasonable jurors could believe and disregard[] all contrary evidence except that which they could not ignore." *Id.* at 830. A directed verdict would be improper if the evidence is within a "zone of reasonable disagreement." *See id.* at 822. When a trial court directs a verdict without stating the specific ground or grounds on which it is relying, the verdict must be upheld if any of the grounds stated in the motion for directed verdict is meritorious. *Prather v. Brandt*, 981 S.W.2d 801, 805 (Tex. App.--Houston [1st Dist.] 1998, pet. denied).

B. Proof of Damages

A plaintiff must produce some evidence from which the fact finder could reasonably infer that the damage sued for has resulted from the conduct of the defendant. *McKnight v. Hill & Hill Exterminators, Inc.*, 689 S.W.2d 206, 209 (Tex. 1985). The evidence

of damages must be based on more than a "suspicion or surmise." *Id.* "Uncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery." *Id.* at 207. Damages that are "remote, contingent, and not . . . a proximate result of the acts of which complaint is made" may not be recovered. *Miller v. Bank of Commerce*, 387 S.W.2d 691, 691-92 (Tex. Civ. App.--Fort Worth 1965, no writ) (holding "actual damage could be no more than a matter of conjecture" under circumstances showing that defendant induced creditor to delay in collecting on debt and delay later barred creditor's claim because defendant filed bankruptcy).

To prove damages, the plaintiff must produce evidence that the defendant's conduct "caused an event and that event caused the plaintiff to suffer compensable damages." *See Keo v. Vu*, 76 S.W.3d 725, 731 (Tex. App.--Houston [1st Dist.] 2002, pet. denied); *see also Sunshine Mining and Refining Co. v. Ernst & Young, L.L.P.*, 114 S.W.3d 48, 52 (Tex. App.--Eastland 2003, no pet.) (holding that there was no causal link between auditor's actions and company's damages because "there must be some evidence that the spring stock offering would have been successful in order for [the company] to establish the causal link for the damages it seeks"). Proof of actual damages must be based on objective facts or data and must be more than conjecture. *See Carter v. Steverson & Co.*, 106 S.W.3d 161, 165-66 (Tex. App.--Houston [1st Dist.] 2003, pet. denied) (noting that lost profits damages must be based on objective facts or data, not speculative or uncertain evidence).

A directed verdict, however, is improper if the plaintiff produces some evidence of a reasonable basis for determining his loss, even if the exact amount is not ascertainable or is contradicted by other evidence. *See Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 483-84 (Tex. 1984); *Field v. AIM Mgmt. Group, Inc.*, 845 S.W.2d 469, 472 (Tex. App.--Houston [14th Dist.] 1993, no writ).

We must determine, therefore, whether any evidence in the record shows, in reasonable probability, damages from GCM's decision to renegotiate the debt rather than to seek foreclosure proceedings in October 1999 or March 2000. *See McKnight*, 689 S.W.2d at 209.

C. The Evidence

Schwartz testified that IFS assets were available in October 1999 and March 2000 if foreclosure on those assets had been accomplished at that time.[7] Schwartz said that "the amount of assets that could have been realized by GCM had it foreclosed on IFS in October 1999 was approximately $77.3 million." Schwartz also testified that the "most conservative" number for GCM's possible recovery from IFS's assets was $67.5 million, which was based on the percentage of outstanding shares that IFS had actually pledged to GCM. These IFS assets included approximately $19 million in cash in October 1999. Schwartz testified that on October 31, 1999, IFS and Interamericas "had sufficient moneys and would have had sufficient moneys to pay the debt to GCM."

On December 31, 1999, IFS had a net value of $143 million, as shown in Grant's audit, and one month later, on January 31, 2000, IFS had a fair market value of $118 million, as shown in Deloitte's

valuation. During the period of time between late 1999 and early 2000, significant assets valued between $90 and $150 million were depleted from IFS and placed into mostly offshore accounts, with no return in assets to IFS, according to Schwartz. Schwartz testified that, in his review of documents and information provided by GCM's attorneys and Hollander, he "saw evidence of assets moving out and not coming back in the system" beginning in late 1999 and early 2000.[8]

By the time of the March 2000 settlement and agreement to restructure the $74 million debt, Schwartz said that IFS had $29.9 million in "assets available." Schwartz arrived at the $29.9 million figure by deducting costs for collecting on the debt from the larger amount of $34 million in available assets. Of the $29.9 million in net assets, Schwartz said that only $13.3 million in assets would have been available if GCM had recovered "nothing but the value of the shares actually pledged." Schwartz reached the figure of $13.3 million by apparently accounting for the amount that would have been necessary to redeem the outstanding shares of preferred stock.

Because of the significant depletion of IFS assets, Schwartz acknowledged that by March 2000, "there was no way GCM was going to get all its money." Schwartz explained that by March 2000, GCM was in a "work-out situation," which he described as follows:

In a credit arrangement borrower/lender, when the loan, the operations of the business, begin to deteriorate and the loan performance, the ability to come to service the loan comes into question, you often find that the bank or lender will put the loan in work-out where they're trying to maximize the

recovery and figure out a strategy that will get them repaid, because [sic] on other than the agreed terms, because the agreed terms, the loan's not going to repay. Any number of factors, the work-out can take out any number of different ways, debt for dividends, interest for bearers, renegotiation.

Schwartz acknowledged that in a work-out situation, "lenders frequently agree to things that they would not normally agree to in order to try to preserve some value" because "the lender is just trying to make the best of a bad situation." Schwartz agreed that "the lender may believe that over the long run they can recover more by restructuring than by incurring the cost of foreclosure and liquidation."

Schwartz related that IFS was no longer in operation as of March 2000 and the only source of payment that GCM would have had was through the sale of the assets of IFS.[9] Schwartz explained that "when you are looking at essentially the assets to pay off the debt, the value of those assets and their retention of value becomes critical to your recovery." Schwartz testified that he was determining the "value of the assets available to pay the debt or at least pay some on the debt." Schwartz said he was "looking at just generally the availability of assets to pay the debt." Schwartz acknowledged that he was not offering an opinion on what GCM might have realized by foreclosing on the shares and attempting to liquidate IFS's assets, but only that there was value in IFS.[10]

D. Analysis

GCM asserts that it has produced some evidence of damages because (1) it would have become the majority shareholder if it had foreclosed on IFS's

stock; (2) IFS had assets available to satisfy some or all of the debt; and (3) Schwartz took the costs of collection of the debt into account when he gave his figures on the available amounts.

1. Majority Shareholder

GCM asserts that had it foreclosed on IFS's stock in October 1999 or March 2000, it would have become the majority shareholder of IFS and would have recovered not only the value of the stock, but it also could have liquidated IFS's assets to recover the debt owed. Schwartz, however, did not offer an opinion on the value of the collateral, the shares of IFS. Schwartz stated that he was not offering an opinion "as to the value of the IFS common stock as to any point in time." Thus, there is no evidence of the value of the collateral--the shares of stock of IFS--in either October 1999 or March 2000.

GCM contends that regardless of the value of IFS's stock, foreclosure on the collateral would make GCM the majority shareholder of IFS, and GCM could have then liquidated the assets of IFS to satisfy the debt. But even assuming that foreclosure proceedings would have enabled GCM to become the majority shareholder in IFS, GCM produced no evidence to show, in reasonable probability, that if it had succeeded at liquidating the assets, what the value of those assets would have been had the liquidation occurred. Schwartz did not testify to what GCM would have realized by foreclosing and liquidating IFS's assets, but only that there was some value in IFS in October 1999 or March 2000, when foreclosure proceedings could have been initiated. GCM, thus, offered no evidence showing that a foreclosure initiated in late October 1999 or in March 2000

would have resulted in the recovery of any of the indebtedness.

No direct evidence shows that foreclosure proceedings would have resulted in GCM's capturing any of IFS's available assets, and the record does not support any such inference. To the contrary, the only reasonable inference from the record is that assets could not have been reached through foreclosure proceedings beginning in October 1999 or March 2000. In October 1999, GCM was in litigation with IFS and Interamericas, and there was an injunction in place preventing GCM from accelerating or foreclosing on the debt. To begin foreclosure in October 1999, GCM would have had to first convince the court to lift the injunction to allow the foreclosure proceedings that were prohibited.(11) Even assuming that GCM could have convinced the court to lift the injunction to allow the foreclosure to proceed, no evidence shows, in reasonable probability, what would have been the result of foreclosure proceedings.

The direct evidence from GCM's advisory committee member Hollander also suggests that it would not be reasonable to infer that foreclosure could have actually resulted in the acquisition of IFS's assets. Hollander testified that one of the reasons that he restructured in October 1999 instead of foreclosing was that the types of default that existed, namely the non-compliance with the book value ratio and IFS's delinquency in producing monthly unaudited financial statements, were not the types of defaults that would cause a court to turn over control of IFS by foreclosing on the majority of outstanding shares of stock. Although knowledge of the $44 million restatement would have given GCM, in Hollander's

words, "more ammunition to fight for a foreclosure," no evidence shows that the information would have resulted in a reasonable probability that GCM could have foreclosed on IFS's collateral. We cannot conclude that the evidence reasonably supports an inference that foreclosure proceedings initiated by GCM in October 1999 could have resulted in GCM's ability to capture any amount of IFS's assets.

By March 2000, IFS's assets were significantly depleted, and no evidence shows in reasonable probability what the result of foreclosure proceedings started in March 2000 would have been. There is simply no evidence that a foreclosure would have been any more successful at recovering any of the IFS debt than the restructure of the debt.

2. Assets Available

There is evidence that IFS had recoverable assets available in October 1999 and March 2000. The record is silent, however, on whether, in reasonable probability, any of the available assets could have been recovered had GCM decided to initiate foreclosure proceedings on IFS's debt in either October 1999 or March 2000, rather than restructure the debt. As discussed more fully above, the collateral for IFS's indebtedness was stock in IFS, not in the underlying assets, and no evidence connects foreclosure on those shares with an ability to collect any amount of assets that was available in October 1999 or March 2000. We conclude that the mere fact that IFS had assets available in October 1999 or March 2000 does not establish that in reasonable probability any amount of those assets could have been actually recovered by foreclosure proceedings initiated on those dates.

3. Cost of Foreclosure

GCM asserts that Schwartz testified about the costs of foreclosure, discounts to be applied to any assets, and the "steps that Plaintiffs were required to take in order to foreclose." Schwartz did not testify about the necessary steps for foreclosure on assets or the reasonable probability of GCM's ability to collect any amount through the foreclosure proceedings. Although Schwartz estimated the costs of collection for a foreclosure in March 2000,[12] he did not describe how any amount of the assets could have been obtained by foreclosure proceedings that began in October 1999 or March 2000. Although Schwarz testified that he deducted the costs of foreclosure from the available amount of assets, his testimony constitutes no evidence of the actual damages incurred by GCM as a result of not foreclosing in October 1999 or March 2000.

4. The Deloitte Valuations and Grant Audits

In its reply brief and in its motions for rehearing, GCM contends that the Grant audits and the Deloitte valuations are some evidence of the value of IFS. Specifically, in its first motion for rehearing, GCM asserts,

Clearly, the audit report and the appraisals present much more than a scintilla of evidence of the value of the IFS shares, they provide direct evidence of the ability of GCM to recover damages, enough so to shift the burden to Appellees to come forward with evidence to the contrary. The anomaly of Appellees' position is obvious. They claim the values in their audit reports and appraisals are correct, yet deny any value in IFS when the damages are presented. Texas courts have long recognized that a party can be equitably estopped from taking inconsistent positions in judicial proceedings. . . . Allowing them

to obtain a verdict in their favor based on their claim that the valuations were correct, while allowing them to argue that IFS had no value from which to collect GCM's debt would be an injustice.

Deloitte, in part, responds that it is GCM that cannot "argue that the valuations accurately reflect some minimum value of IFS, to which GCM would have been automatically entitled" because GCM claimed that the valuations were "inflated and unreliable."

"'Assertions of fact, not plead in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.'" *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (quoting *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983)). "A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact." *Id.* (citing *Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458, 467 (Tex. 1969)).

In its live pleading before the trial court, GCM alleged the following facts regarding the Grant audits:

- the audits contained a "combination of non-disclosure of expenses and overstatement of assets [that] created a *grossly misleading* picture of IFS' financial condition" during the relevant periods;

- Grant negligently failed "to determine that IFS's financial statements did not fairly present IFS' financial condition in all respects";

• Grant concealed "IFS's true financial status from [GCM], as well as the relevant state and federal authorities";

• Grant negligently failed "to disclose that IFS's 1998 and 1999 financial statements contained *material misstatements* and *grossly misstated* IFS' financial condition";

• Grant negligently "overvalu[ed] assets" of IFS; and

• Grant committed common law fraud by failing to disclose that its earlier opinion--that IFS's financial statements "presented the financial condition of IFS fairly in all material respects"--was in fact false.

(Emphasis added).

GCM alleged the following concerning the Deloitte valuations:

• they "were seriously flawed";

• they "contained *gross errors* and negligent misrepresentations";

• Deloitte negligently "failed to determine in its valuations that the stocks and receivables were

worthless or worth millions of dollars less than represented by IFS";

• Deloitte negligently "overvalued IFS *by millions of dollars*" in the first valuation and this carried over into subsequent valuations;

• Deloitte caused GCM's damages because the "flawed valuations" prevented GCM from being able to convince a court that its debt was under-collateralized;

• Deloitte's valuations were a "*massive overvaluation* of IFS";

• the valuations contained "faulty, misrepresented information" and "errors in the valuations";

• Deloitte assisted Pimienta in making "false misrepresentations and omissions of facts regarding the value of IFS";

• Deloitte's valuations contained "mistakes in the valuations regarding the total assets in the report"; and

• Deloitte, acting fraudulently with Pimienta, made "material misrepresentations to [GCM] concerning the amount and status of the collateral that secured IFS's debt."

(Emphasis added).

These allegations of Grant's and Deloitte's wrongful acts were not made in the alternative. Further, the inaccuracy of the audits and valuations forms the basis of GCM's theory of liability. If they are not inaccurate, GCM could not have been harmed by relying on them--as it alleges in its petition. Finally, in arguing the directed verdict before the trial court, GCM did not assert that the audits and valuations were accurate enough to provide an estimate of GCM's value.

Here, as a basis for liability, GCM made assertions of fact that were not pleaded in the alternative and that were clear and unequivocal. *See Holy Cross*, 44 S.W.3d at 568. Accordingly, these assertions are judicial admissions that are binding upon GCM. *See id.* Therefore, the audits and valuations do not provide some evidence of what GCM could have recovered in a foreclosure in either October 1999 or March 2000--the theory of damages alleged by GCM. (13), (14)

5. The Loan Documents

In its reply to Grant's and Deloitte's response to its first motion for rehearing, GCM contends that this Court erred in its original opinion in this case by discussing the "perceived difficulties in foreclosing on the IFS assets" because of the "ease with which foreclosure occurs under the loan documents." (15) Specifically, GCM asserts that the loan documents

provided that Chase Bank was the custodian of the collateral--the shares of IFS. GCM then asserts that "[i]n the event of default" Chase Bank would turn over the shares at GCM's demand.[16] GCM could then hold an emergency shareholders' meeting and elect new officers and directors for IFS "strip[ping] Pimienta of any authority to act for IFS." This, contends GCM, would have prevented Pimienta from transferring any assets and given GCM the ability to dispose of the assets.[17] GCM finally asserts that the ease of foreclosure was further shown because "[i]f IFS chose to contest the turnover, it was required to do so in fast moving arbitration."

GCM also contends that the events "that took place after the CLA restructure in May 2000 . . . have little relevance to events that could have taken place in October 1999 or March 2000, because after May 2000, the parties were operating under entirely new loan documents, and because the passage of time had allowed Pimienta to move assets out of reach."

Grant responds that in October of 1999, when GCM claims that it relied upon Grant's audit to its detriment, there was still an injunction in place preventing GCM from foreclosing. Grant further points out that, under the Uniform Commercial Code (UCC), merely taking possession of the collateral (the shares of IFS) was not enough for GCM to become the holder of the shares and thus able to vote on them and take control of IFS. Rather, the requirements of the UCC would have to be met, and there was no evidence regarding these necessary steps.[18] Finally, in a point that Deloitte also makes, Grant asserts that looking to the actual foreclosure that Blitz initiated in June of 2000 is appropriate because Hollander testified that each restructuring

put GCM and Blitz in a better position regarding its indebtedness.

First, throughout its brief and motions for rehearing, GCM speaks of foreclosing on the assets of IFS. However, the collateral for the loans were shares of IFS--not the assets. GCM presented no evidence of the value of those shares.[19] Thus, even if GCM was able to easily take possession of the shares, under its theory of damages, it still would have to contend with Pimienta,[20] convert possession of the shares into control of IFS, and then take control of and liquidate IFS's assets. However, Schwartz only testified that IFS had assets with some value from which GCM could have recovered.[21]

GCM's assertion that we should not consider the events surrounding the eventual foreclosure in June 2000 is inconsistent with the evidence it presented at trial. Hollander testified that the restructuring gave Blitz more favorable terms and conditions than GCM had previously. Thus, the only reasonable inference is that an earlier foreclosure would have been more difficult than the one that actually took place.

6. Conclusion

GCM stated its theory of damages to the trial court as follows:

We are trying to collect the money that GCM would have had if it had chosen to foreclose in October, or it had later chose[n] to foreclose in March. That is what we are trying to recover.

GCM, however, did not present any evidence to provide the trier of fact a reasonable basis for determining the amount of money that it would have recovered had it sought foreclosure in October 1999

or March 2000. It is undisputed that when Blitz attempted to foreclose on the debt in June 2000, IFS actually transferred its assets to other entities in violation of the court order and then declared bankruptcy, making the debt uncollectible. GCM failed to produce any evidence that foreclosure proceedings initiated three months earlier in March 2000 or nine months earlier in October 1999 would have enabled it to acquire any assets of IFS. Even if GCM had opted to foreclose and began foreclosure proceedings on the collateral of IFS, there is no evidence in the record that any such foreclosure would have actually resulted in GCM's ability to take possession of the majority stock of IFS, or the value of that stock. Furthermore, even if GCM had taken possession of the stock to become the majority shareholder, there is no evidence that any assets would have been reached through liquidation of the IFS assets when that would have occurred at some time following the foreclosure proceedings. *See Sunshine Mining and Refining Co.*, 114 S.W.3d at 52 (holding that there was no causal link between auditor's actions and company's damages because "there must be some evidence that the spring stock offering would have been successful in order for [the company] to establish the causal link for the damages it seeks"); *Keo*, 76 S.W.3d at 731.

Thus, GCM presented no evidence of any damages resulting from its decisions in October 1999 and March 2000 to restructure IFS's debt. GCM presented no basis for a jury to determine, with reasonable certainty, the amount of "money that GCM would have had if it had chosen to foreclose." *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 50 (Tex. 1998) (holding that there was no evidence that plaintiff

would have obtained contract had its bid been lower); *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 650 (Tex. 1994) (holding that there was no evidence that plaintiff could have retained accounts for any period of time because account holders could transfer accounts at will); *Miller*, 387 S.W.2d at 692 (holding that, because it was not certain creditor's effort to collect debt would have been successful, there was no evidence of damages).[22] GCM's expert on damages, Schwartz, acknowledged that he was not offering an opinion on what GCM might have realized by foreclosing on the shares and attempting to liquidate IFS's assets, only that there was some value from which GCM could recover some part of its debt. Accordingly, we hold that the trial court did not err by granting a directed verdict in favor of Grant and Deloitte on the ground that GCM presented no evidence of damages.[23] *See City of Keller*, 168 S.W.3d at 813 (noting that evidence is not legally sufficient "if jurors would have to guess whether a vital fact exists").

In support of its arguments, GCM relies on *Vance* and *Field*, but both cases are factually distinguishable. In those cases, the evidence established *some* amount for the damages, but here no evidence and no reasonable inference from the evidence shows any amount of damages caused by GCM's decision not to foreclose. *See Vance*, 677 S.W.2d at 484 (holding that directed verdict was improper on element of damages because some evidence showed reasonable basis for determining party's loss, even though exact amount of damages could not be ascertained and there was substantial conflict in evidence with regard to exact cost of repairs); *Field*, 845 S.W.2d at 472 (holding that directed verdict was improper on element of damages

because plaintiff recited amount for which stock could have been sold, stockbroker testified regarding probable value of stock, and AIM executive related how much was eventually paid for plaintiff's AIM stock). In its first motion for rehearing, GCM again cites these cases, explaining them in the following parenthetical: "holding a directed verdict is improper if the plaintiff produces some evidence of a reasonable basis for determining his loss, even if the exact amount is not ascertainable or contradicted by other evidence." This is correct. A party seeking damages must present *some evidence of a reasonable basis for determining his loss*. The proof of damages fails here because no evidence shows a reasonable basis for determining the loss to GCM.

In its first motion for rehearing, GCM also asserts that there is no Texas case "directly on point on how to calculate damages when one is wrongfully prevented from foreclosing," but that "[c]ourts in other states have had no problem upholding damages." The lone authority that GCM identifies is *Brown v. Critchfield*, 161 Cal. Rptr. 342 (Cal. Ct. App. 1980).[24] In *Brown*, the plaintiff sued his former attorney and real estate agent alleging that their fraud, negligence, or breach of fiduciary duties had damaged him. *Id.* at 344. The plaintiff had sold real property and retained a deed of trust to secure the purchaser's indebtedness. *Id.* at 345. The plaintiff released 15.56 acres to the purchasers, who later sold the property for $335,000. *Id.* The plaintiff brought suit against his real estate agent and attorney, alleging that because of their failure to inform him that the purchasers were in default at the time he released the 15.56 acres, he was damaged by that erroneous advice. *Id.* at 344. The plaintiff alleged that he was damaged in the amount

that the purchasers received--$335,000. *Id.* at 351. The trial court granted summary judgment for the defendants on the grounds that the damages alleged by the plaintiff were not recoverable as a matter of law and the plaintiff had therefore failed to state a cause of action. *Id.* at 344.

The court noted that the plaintiff's alleged measure of damages was wrong. *Id.* at 351. However, the court stated the general rule that "[u]ncertainty as to the fact of damage, that is, as to its nature, existence or cause of the damage, is fatal" to a plaintiff's cause of action. *Id.* at 350. The court also stated that "recovery will not be denied because the damages are difficult of ascertainment." *Id.* at 351. The court, after analyzing the California anti-deficiency legislation and concluding that it did not bar the plaintiff's damages, noted that there were three alternatives showing how plaintiff was damaged by the erroneous advice of his agent and attorney.(25) *Id.* at 350-51. The court noted that it did not matter which of these was correct, because the plaintiff had adequately alleged the fact of damages. *Id.* at 351. The court therefore reversed the summary judgment. *Id.*

Brown is distinguishable from this case. First, it involved a summary judgment as a matter of law concerning the adequacy of the pleadings, not a motion for directed verdict due to no evidence of damages. As the *Brown* court stated in the opinion, "The sole issue on appeal is whether plaintiff has alleged damages sufficient to support his causes of action for fraud and negligence." *Id.* at 345. Further, based on the statement in *Brown*, it appears that the general rule in California is in accord with Texas law--that uncertainty as to the fact of damages is

fatal to recovery, but the fact that damages are incapable of precise calculation is not. *Compare id.* at 350-51 *with McKnight*, 689 S.W.2d at 207. The plaintiff in *Brown* adequately alleged that the wrongful act of defendants caused him some damages. *Brown*, 161 Cal. Rptr. at 350. Here, our analysis of the law and the evidence leads us to the conclusion that GCM did not present any evidence from which a trier of fact could determine with reasonable certainty the amount of damages caused by Grant's and Deloitte's alleged misconduct--an issue not addressed in *Brown*. We therefore conclude that *Brown* is not persuasive in this context.

We overrule GCM's third issue.

GCM's Texas Securities Act Claims

In its eleventh issue, GCM contends that the trial court erred by granting summary judgment for Deloitte on GCM's claims for violations of the Texas Securities Act because the Commercial Loan Agreement (CLA) is a security.

"If summary judgment may have been rendered, properly or improperly, on a ground not challenged, the judgment must be affirmed." *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 898 (Tex. App.--Houston [1st Dist.] 2002, no pet.); *see also Jacobs v. Satterwhite*, 65 S.W.3d 653, 655 (Tex. 2001) (holding appellate court may not reverse judgment on grounds not raised and argued on appeal); *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209-10 (Tex. 1990) (same). That the CLA was not a security is only one of the grounds that Deloitte asserted as a basis for its motion for summary judgment. GCM does not attack any other ground for summary judgment. We therefore affirm the summary

judgment with respect to GCM's Texas Securities Act claims. *See Ellis*, 68 S.W.3d at 898.

In its first motion for rehearing, GCM contends that the trial court did not grant summary judgment without specifying the grounds for it. GCM contends that the reporter's record shows that the trial court expressly only considered the point that it now attacks on appeal (that the Commercial Loan Agreement was not a "security") and no other.

A judge's oral comment at a hearing on a motion for summary judgment cannot be used to specify the ground upon which summary judgment was granted. *Richardson v. Johnson & Higgins of Tex., Inc.*, 905 S.W.2d 9, 11 (Tex. App.--Houston [1st Dist.] 1995, writ denied). "It is the court's order that counts, not the stated reason or oral qualifications." *Id.*; *see also Ajudani v. Walker*, 177 S.W.3d 415, 417-18 n.3 (Tex. App.--Houston [1st Dist.] 2005, no pet.) (following *Richardson*). Here, the trial court's order states,

The Court, having considered [another party's motion] and the motion for summary judgment filed by Deloitte & Touche LLP ("Deloitte"), as well as any timely-filed response, hereby ORDERS as follows:

The motions for summary judgment are granted in Part and all of Plaintiffs' causes of action against [the other party] and Deloitte asserted under the Texas Securities Act are hereby dismissed.

The trial court's order simply states that Deloitte's summary judgment on the Texas Securities Act claim was granted. The order does not specify any specific ground. Because the order itself did not specify the

grounds, the trial court's oral comments at the hearing cannot be the basis for specifying a particular ground upon which summary judgment was granted. *See Ajudani*, 177 S.W.3d at 417-18 n.3; *Richardson*, 905 S.W.2d at 11.[26]

We overrule GCM's eleventh issue.

Having overruled GCM's third and eleventh issues, we need not reach GCM's first, second,[27] and fourth through tenth[28] issues, nor Grant's two cross-points.[29]

Conclusion

We affirm the judgment of the trial court. All pending motions are dismissed as moot.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justice Jennings.

1. Rule 41.1(b) of the Texas Rules of Appellate Procedure provides, in pertinent part,

After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices.

Tex. R. App. P. 41.1(b).

2. Blitz sought no independent relief in the case, but sued as a "necessary party."

3. The market value ratio required that the market value of the pledged shares of IFS stock be at least 1.5 times the total debt owed by Interamericas and IFS to GCM. The book value ratio required that the book value of the stock be at least 1.3 times the total debt.

4. After Blitz filed its lawsuit, GCM and Blitz received from Deloitte, on July 2000, Deloitte's business valuation of IFS "as of January 30, 2000," which showed that IFS had a significant value of $118 million. Later that year, in November 2000, GCM and Blitz received Deloitte's business valuation of IFS "as of June 30, 2000," which still showed a significant value of $48 million.

5. Deloitte moved for directed verdict on this ground, asserting that "there is no competent, credible evidence of what amount of money would have been collected" had GCM attempted to foreclose in October or March and, therefore, "there is no evidence that the jury could conclude what the damages are." Grant joined in this motion.

6. At the hearing on the directed verdict, the trial court stated, "Actually, you've got no evidence as I recall of any of your experts saying what would have been recovered."

7. Schwartz testified as follows:

[Attorney]: What we put in front of the jury with respect to March is your expert opinion as to what could have been acquired, foreclosed?

[Schwartz]: Had GCM - -

[Attorney]: If GCM had exercised its right to foreclose, this is the amount of money you would have expected to recover from the assets?

[Schwartz]: Yes.

[Attorney]: And the same is true for October. If they had seized the assets in October?

[Schwartz]: Yes.

8. Schwartz gave examples of how the money was transferred out of IFS. Schwartz stated that IFS invested $24 million in a start-up company called Pueblo, by the spring of 2000, a lot of loans were made to a company called UNI, $3 million was loaned to a company called Larce in February 2000, $13 million was loaned to a company called Southsea before March 2000, $4.5 million was loaned to a company called Northsea before March 2000, and the $44 million management fee was paid sometime in late 1999 or early 2000. Schwartz also testified that additional transfers were made after March 2000, although he did not identify specific transactions.

9. In its first motion for rehearing, GCM asserts that this Court erred in its original opinion by stating that "IFS was no longer in operation as of March 2000 and the only source of payment that GCM would have had was through the sale of the assets of

IFS." Specifically, GCM contends that this Court did not indulge every reasonable inference in its favor, as required by the standard of review, because the Deloitte valuation as of June 30, 2000, was made "under the premise of value as a going concern business enterprise with continuing operations," and because Hollander testified that IFS was "partially liquid" in March 2000.

GCM attempted to prove damages through Schwartz. The damages claimed by Schwartz were premised on his assessment that IFS was no longer in operation. Hollander's testimony that IFS was partially liquid, therefore, is not pertinent to the testimony by Schwartz, whose opinion concerning damages was premised on the assessment that IFS was no longer in operation. We also note that although GCM asserts that Deloitte's June 30, 2000 valuation was premised on the continued operations of IFS, this is a newly asserted theory in its first motion for rehearing that is contrary to the theory asserted at trial. In its petition at trial, GCM asserted that "the transfer of the last hard operating asset and cash of IFS" occurred in May 2000.

10. Schwartz testified about his calculations as follows:

[Attorney]: . . . . The damage calculations that you've put before the Court and the jury today, those are hypothetical numbers with respect to what might have been recovered, aren't they?

[Schwartz]: I'm sorry, which ones are we talking about?

[Attorney]: The ones in October, either one of the ones in October?

[Schwartz]: Hypothetical, what we are trying to do is get an estimate that there appeared to be sufficient assets to pay the debt in October. That's what that does for me.

[Attorney]: But you're not offering any opinion that any of those assets could or couldn't have actually been realized upon, are you?

[Schwartz]: Well, we know that some of them are realized upon. We know they've raised $80 or $90 million from the sale of two subsidiaries between October and January. There's information that there's value there. I mean, I'm not opining that that is the number that would have been realized.

Schwartz also testified,

[Attorney]: I understand. But your objective is the same, right, to estimate the amount of or the value of assets available to pay the debt as of that point in time?

[Schwartz]: The value of the assets available to pay the debt or at least pay some on the debt.

11. In its first motion for rehearing, GCM asserts that this Court engaged in "an incomplete analysis of the evidence" regarding the injunction that was in place in October of 1999. In its entirety, GCM's first rehearing motion on this point states:

The Panel states that "GCM would have had to first convince the court to lift the injunction to allow foreclosure proceedings." This is not so much an error as it is an incomplete analysis of the evidence. The federal court had already required IFS to make a $21 million deposit in the registry of the court by November 1, 1999, as a condition of keeping the injunction. By the time of the October 1999 restructure, IFS had not made the deposit, but instead renegotiated. The logical inference is that the TRO could have been easily vacated if the deposit were not made.

The only evidence that GCM identifies in its first rehearing motion is evidence that the November 1, 1999, deadline existed and that the case was settled on October 27, 1999, by the October debt restructure. GCM asks that we assume that IFS would not have made the required $21 million deposit into the registry of the court by November 1, 1999, and that we therefore must assume that the court would have lifted the injunction. We cannot make those assumptions, however, because the undisputed

evidence is that IFS paid $20 million to GCM in the weeks following the October 1999 restructure. No evidence supports making those assumptions.

In its second motion for rehearing, GCM asserts that the injunction "has no relevance as to whether a foreclosure could have taken place in March 2000." We agree. We have not considered the injunction with respect to the possible foreclosure in March 2000.

12. Schwartz merely reduced the value of the assets that he said were available from approximately $34 million to $29.9 million. He did not explain why he chose that amount. Schwartz did not offer any testimony on the amount for costs of foreclosure in October 1999.

13. GCM also appears to contend that, because it did not allege the third Deloitte valuation as a basis for liability, the third valuation provides some evidence of IFS's worth and is close in time to the March foreclosure. First, as detailed above, GCM alleges that all of the Deloitte valuations were "seriously flawed" and "contained gross errors." Further, GCM repeatedly explains that the third valuation shows the same value as the second, only changing because the assumption of Interamericas's debt via the March restructuring appears for the first time on the third valuation. That is, the second valuation shows a value of $118,800,000. After subtracting the $70,000,00 indebtedness, IFS's value is $48,800,000--the amount shown in the third valuation.

14. GCM cites to *Smith v. Chipley*, 16 S.W.2d 269 (Tex. 1929). GCM quotes the following passages to support its argument: "To permit a party to . . .

[make] a representation as to a given state of facts, and thus obtain an advantage over his adversary . . . and then . . . assert . . . the very matter disclaimed . . . would be contrary to every principle of right, and will not be tolerated." *Id.* at 276. However, the ellipses in the quote leave out important facts that show *Smith* is distinguishable from this case. As the supreme court phrased the issue in that case:

We are therefore confronted with this one question: Can Mrs. Chipley invoke the jurisdiction of the Supreme Court to grant her relief, basing her grounds for relief on the plain and direct statement that the partnership had been wound up, and that she had and claimed no interest in the profits, and was not liable for any losses arising out of the sale of the west one-half of said land, that there were no losses or liabilities to be settled, that same had already been settled, that Smith was entitled to all the profits, and liable for all the losses on said west half; and many other statements of the same nature, and thus rightfully or wrongfully, it being immaterial which, obtain a judgment in her favor in the Supreme Court, and then later institute and maintain another suit against the very same party on the very claim that she disclaimed any interest in the first suit? We think that to state the question is to answer it.

Id. at 275-76. Here, neither Grant nor Deloitte have made representations to a court to secure a judgment in its favor and then--in a subsequent proceeding--asserted a claim inconsistent with those

representations. Thus, *Smith* is not controlling in this case.

15. GCM cites to no authorities to support this point in its motion for rehearing.

16. Despite the defaults that existed and of which GCM was aware, GCM never made this demand.

17. To support these assertions in its rehearing motions, GCM cites generally to the Security Agreement, Agreement Concerning Collateral, the Basic Agreement, and the Credit Agreement, without specifying any particular section. However, the section that sets forth the remedies in the event of default (in the Security Agreement) provides a procedure for GCM to sell the collateral--not a procedure for Chase Bank to turn the shares over to GCM. The Security Agreement does provide that GCM would have the voting rights of the shares during an "event of default," but that section acknowledges that IFS or Pimienta would have to "give consents, ratifications and waivers" to give these votes "the same force and effect as if [GCM] were the owner" of the shares.

18. For example, UCC section 9.620 provides a number of requirements for a secured party to accept collateral in satisfaction of the debt, rather than conducting a foreclosure sale. *See* Tex. Bus. & Com. Code Ann. § 9.620 (Vernon 2002).

19. GCM identifies the following testimony from Schwartz, the accountant who served as GCM's damages expert, as some evidence of raising at least a fact issue with respect to the value of the shares and, thus, the amount of damages:

[Attorney]: Just by way of summing up. In your analysis, if in October you recover nothing but the value of the shares pledged, the shares that were in GCM's hands, you get $67,500,000, correct?

[Schwartz]: Correct.

[Attorney]: The most conservative possible number?
[Schwartz]: Yes.
[Attorney]: And with respect to the most conservative possible number as to March, it's 13,284,000?
[Schwartz]: Correct.

First, as detailed in the opinion, Schwartz clearly states that he is not giving an opinion on the value of the shares (or what GCM might have recovered), only that IFS had some assets available from which GCM might recover. Further, from the phrasing of the questions and the overall context of Schwartz's testimony, GCM has not accurately interpreted the above exchange. Schwartz's damages model relied on the percentage of all the IFS stock pledged to secure the debt, as well as all other stock held by Interamericas and Pimienta. Schwartz performed two damages calculations for both October 1999 and March 2000--one for the higher percentage of shares and one for the lower. Schwartz identified a value of IFS's underlying assets and then multiplied this number by the two percentages of shares.

Thus, the testimony above--when taken in context of Schwartz's damages model and the rest of his testimony--clearly refers only to the lower percentage of stock, not to some estimate of the actual value of the shares.

20. GCM presented evidence that Pimienta would, and, in fact, did, fight to delay or prevent every action that GCM took to foreclose or collect on its loans.

21. In its second motion for rehearing, GCM asserts that Schwartz did state an opinion as to the amount that GCM could have recovered. GCM points to the testimony of Schwartz quoted in footnote 7 *supra*. However, as discussed above, when asked for details, Schwartz repeatedly stated that he was not stating an opinion on the value of the collateral, but only that IFS had some assets available from which GCM could have recovered had it foreclosed. The other excerpt of Schwartz's testimony cited by GCM in its second motion for rehearing illustrates this point:

[Attorney]: At the end of the day, your conclusion is as of October 31, 1999, there was more than enough money to pay the debt?

[Schwartz]: Yes.

[Attorney]: So, what you're saying is that if management had managed to get control of the assets, if GCM had managed to get control of the assets as of October 31, 1999 and liquidated them, after incurring costs and things of that nature, there would have been more than enough there to pay the debt?

[Schwartz]: It appears that would have been the case.

However, as discussed more fully below, we conclude that the existence of assets that "appear" to be enough to cover a debt is not sufficient evidence of what, in reasonable probability, GCM would have recovered in a foreclosure.

22. In its first motion for rehearing, GCM criticizes this Court's reliance on *Miller v. Bank of Commerce*, 387 S.W.2d 691 (Tex. Civ. App.--Fort Worth 1965, no writ). Specifically, GCM points out that the authorities relied upon by the court in *Miller*--a section of *Corpus Juris Secundum* and *Evans v. Burson*, 65 Okla. 114 (1917)--both refer to an unsecured creditor--not a secured creditor like GCM. GCM contends that a case much more on point is *Ross v. W.D. Cleveland & Sons*, 133 S.W. 315 (Tex. Civ. App.--Houston [1st Dist.] 1910, no writ). GCM explains that, in *Ross*, the creditors were granted a security interest in collateral to secure a debt, but "refrained from collecting the debt, based on fraudulent misrepresentations from Defendant, until the collateral was wasted and the debtor was insolvent."

First, the court in *Miller* nowhere expressly states that its holding applies only to secured creditors. Further, GCM does not contend that the general rules that a plaintiff is required to produce some evidence from which the jury could reasonably determine its loss and that speculative damages are not recoverable do not apply in this case.

In *Ross*, the court affirmed a jury verdict for the plaintiff, who was a secured creditor of the debtor. *Ross*, 133 S.W. at 317. The defendant, who was also a secured creditor of the debtor, had the collateral in his possession. *Id.* The defendant "negligently failed to exercise ordinary care to preserve, utilize, and appropriate the proceeds" of the collateral. *Id.* The plaintiffs sued the defendant, not for misrepresentations about the collateral, but for the negligent wasting of the collateral. *Id.* Here, the allegations against Grant and Deloitte are based on misrepresentations--not on their having negligently wasted the collateral. Thus, *Ross* is distinguishable.

23. In its second motion for rehearing, GCM also contends that this holding sets a "dangerous precedent" because this Court is holding that "any damages that may arise out of future foreclosure are too speculative to allow recovery." We disagree. As discussed in the body of this opinion, we are holding that the evidence *in this case* is not sufficient to survive a no-evidence review.

24. GCM did not raise this case before the trial court or in its original brief to this Court.

25. Because of the erroneous advice the "plaintiff was damaged for the following reasons:

(1) If the purchasers had cured the default, plaintiff would not now be liable for the delinquent taxes, penalties and redemption fees.

(2) If plaintiff had foreclosed and entered a full credit bid, he would now have the property or its equivalent

value in money, and would not now be liable for tax penalties and redemption fees.

(3) If another bidder had obtained the property, plaintiff would have recovered foreclosure costs and would not now be liable for the delinquent taxes, penalties and redemption fees."

Brown v. Critchfield, 161 Cal. Rptr. 342, 351 (Cal. Ct. App. 1980).

26. In its motions for rehearing, GCM also contends that Deloitte's other, unchallenged grounds for summary judgment were all derivative of and dependent upon Deloitte's contention that the Commercial Loan Agreement was not a security. This is not the case. For example, Deloitte's supplemental motion for summary judgment included as grounds that, even if the Commercial Loan agreement was a security, the evidence established that Deloitte did not aid or abet a violation of the Texas Securities Act or, alternatively, that there was no evidence that Deloitte aided or abetted a violation of the Act.

27. In its second issue, GCM challenges the trial court's directed verdict on the lack of proof of damages due to undisputed evidence that GCM transferred the debt to Blitz and that Blitz fully satisfied the debt with a promissory note to GCM for the entire amount of the debt owed by IFS to GCM. We do not reach this alternative argument that there is no proof of damages due to the full satisfaction of the IFS debt by the promissory note given to GCM by Blitz. To the extent that Deloitte and Grant contend

that GCM lacks standing due to the promissory note from Blitz, we reject that challenge because the pleadings by GCM alleged that the erroneous information provided by Grant and Deloitte caused GCM to restructure the debt rather than to foreclose on the notes and that, had it foreclosed, it would have recovered something more than a worthless promissory note. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (holding that pleadings, viewed in favor of plaintiff, must allege facts that affirmatively demonstrate court's jurisdiction to hear case); *Cedar Crest Funeral Home, Inc. v. Lashley*, 889 S.W.2d 325, 330 (Tex. App.--Dallas 1993, no writ) (holding that pleadings that alleged injury from wrongful conduct showed plaintiffs had standing).

28. In its first issue, GCM challenges the directed verdict in favor of Grant and Deloitte by asserting that it produced more than a scintilla of evidence that it was unnecessary to produce the other members of the advisory committee to establish that they would have voted to foreclose because Jorge Hollander and Malu McKee, through Gamma Capital Services, had the power to foreclose on IFS. In its fourth and fifth issues, which concern Grant only, GCM contends that it introduced more than a scintilla of evidence of Grant's fraud or negligence in failing to timely notify GCM of the 1999 change to the 1998 audit and that it could have foreclosed under other sections of the agreement, even if GCM had waived the "book value ratio." GCM's remaining issues, numbered six through 10, concern Deloitte only. GCM contends that it produced some evidence that Deloitte's business valuations were inaccurate and that Deloitte committed fraud and conspired to commit fraud with IFS. GCM also asserts that it did

not impermissibly fracture its causes of action against Deloitte, that its claims against Deloitte are not barred by the statute of limitations, and that the evidence supports punitive damages.

29. In its two cross-points, Grant challenges the trial court's denial of a directed verdict on its negligent misrepresentation claim on the grounds that (1) a negligent misrepresentation claim requires that the representation be made to a known party for a known purpose and that GCM did not rely on Grant's audits for a known purpose, and (2) there was no duty to disclose information under the facts of this case.

App. D

Order issued December 20, 2007

In The
Court of Appeals
For The
First District of Texas

NO. 01-04-00627-CV

BLITZ HOLDINGS CORP. AND GCM CORPORATION, LTD., Appellants

V.

GRANT THORNTON, LLP AND DELOITTE & TOUCHE, LLP, Appellees

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On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 2001-38158

ORDER ON MOTION TO RECUSE

Appellants, GCM Corporation, Ltd. And Blitz Holdings Corp., filed a motion requesting

that Justice Elsa Alcala "recuse herself from this case" that is pending before the First Court of Appeals. Appellees, Grant Thornton LLP and Deloitte & Touche LLP, responded that the motion to recuse Justice Alcala is without merit and not timely. Having reviewed the motion and responses, I grant the motion to recuse myself and withdraw from any further proceedings in this case. ***See*** **Tex. R. App. P. 16; Tex. R. Civ. P. 18b(2)(a);** ***Rogers v. Bradley*****, 909 S.W.2d 872, 881 (Tex. 1995)**

(Enoch, J., concurring).

/s/
Elsa Alcala
Justice

App. E

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

MEMORANDUM ORDER ON MOTION FOR REHEARING

Style: Blitz Holdings Corp. and GCM Corporation, Ltd. V. Grant Thornton, LLP and Deloitte & Touche, LLP

Cause number: 01-04-00627-CV

Date motion filed: May 23, 2008

Party filing motion: Appellants

The motion for rehearing is denied.

Judge's signature: /s/ Sherry Radack
Acting for the Court

Panel consists of Chief Justice Radack and Justice Jennings.

Date: July 28, 2008

App. F

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

MEMORANDUM ORDER ON MOTION FOR RECONSIDERATION EN BANC

Style: Blitz Holdings Corp. and GCM Corporation, Ltd. V. Grant Thornton, LLP and Deloitte & Touche, LLP

Cause number: 01-04-00627-CV

Date motion filed: May 30, 2008

Party filing motion: Appellants

The motion for reconsideration en banc is denied.

Judge's signature: /s/ Sherry Radack
Acting for the Court

En banc court consists of Chief Justice Radack and Justices Taft, Nuchia, Jennings, Keyes, hanks and Bland.

Date: July 28, 2008

App. G

BLITZ HOLDINGS CORP. AND GCM CORPORATION, LTD. v. GRANT THORNTON, LLP AND DELOITTE & TOUCHE, LLP

08-0757

SUPREME COURT OF TEXAS

2008 Tex. LEXIS 1032

November 14, 2008, Order Pronounced

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1]

From Harris County; 1st district (01-04-00627-CV, SW3d , 05-08-08).

Blitz Holdings Corp. v. Grant Thornton, LLP, 2008 Tex. App. LEXIS 3315 (Tex. App. Houston 1st Dist., May 8, 2008)

OPINION

PETITION FOR REVIEW DENIED.

App. H

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS

RE: Case No. 08-0757
COA #: 01-04-00627-CV TC #: 2001-38158
STYLE: Blitz Holdings Corp. and GCM Corporation, Ltd. V. Grant Thornton, LLP and Deloitte & Touche, LLP

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review

Date: 01/09/2009